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61ST CONGRESS : : 3D SESSION

DECEMBER 5, 1910-MARCH 4, 1911

PROCEEDINGS

# SENATE DOCUMENTS

Arbitration

THE PERMANENT COURT OF ARBITRATION  
AT THE HAGUE

UNDER THE PROVISIONS OF THE GENERAL TREATY OF  
ARBITRATION OF APRIL 1, 1901 AND THE SPECIAL  
AGREEMENT OF JANUARY 21, 1901 BETWEEN  
THE UNITED STATES OF AMERICA  
AND GREAT BRITAIN

## VOL. 81

IN TWELVE VOLUMES

VOLUME XI





NORTH ATLANTIC COAST FISHERIES

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PROCEEDINGS

IN THE

North Atlantic Coast Fisheries  
Arbitration

BEFORE

THE PERMANENT COURT OF ARBITRATION  
AT THE HAGUE

UNDER THE PROVISIONS OF THE GENERAL TREATY OF  
ARBITRATION OF APRIL 4, 1908, AND THE SPECIAL  
AGREEMENT OF JANUARY 27, 1909, BETWEEN  
THE UNITED STATES OF AMERICA  
AND GREAT BRITAIN

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NORTH ATLANTIC COAST FISHERIES

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ORAL ARGUMENTS

PRESENTED BY

THE UNITED STATES AND  
GREAT BRITAIN

BEFORE THE

TRIBUNAL CONSTITUTED UNDER AN AGREEMENT

SIGNED AT WASHINGTON

ON THE 27TH DAY OF JANUARY, 1909

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(IN THREE PARTS)

PART 3

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## ORAL ARGUMENTS BEFORE THE PERMANENT COURT OF ARBITRATION.

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TWENTY-NINTH DAY: MONDAY, JULY 25, 1910.

**ARGUMENT OF THE RIGHT HONOURABLE SIR WILLIAM SNOWDEN ROBSON, K. C., HIS MAJESTY'S ATTORNEY-GENERAL, ON BEHALF OF GREAT BRITAIN.**

**THE PRESIDENT:** Will you please, Mr. Attorney-General, begin your address to the Court?

**THE ATTORNEY-GENERAL, SIR WILLIAM ROBSON:** Mr. President and gentlemen of the Tribunal, it now becomes my duty to sum up the Case for Great Britain in this long and complicated controversy; and in respectfully acknowledging the extreme patience and courtesy with which the Tribunal has heard the arguments of counsel on both sides, I think I must ask for some measure of indulgence for myself, in approaching a case which has already been discussed before them at such great length and with such abundant detail. In a summing-up speech which, I suppose, is intended to deal with the case as a whole, finally and comprehensively, it would be impossible altogether to avoid some degree of repetition. I shall try, however, and I think I can promise, to make that repetition as little as possible. I hope it will only arise when I am endeavouring to cast fresh light upon some perhaps familiar feature of the case, or when I am seeking to give to certain essential points some special force and prominence.

The need for general observations or historic retrospect is, happily, now passed; and I shall proceed at once to the specific questions.

The first question, which has occupied so great, but by no means disproportionate a part of your time during this long period, is one of which, really, it would be very difficult for me to exaggerate the importance. It has an importance far beyond that of the interests of the parties immediately concerned. It touches, indeed, the very foundations of international law. It affects the security of national sovereignty, in all those nations, and they are many, both great and small—particularly small—who have thrown open their territory, or some part of their territory, to their neighbours by binding and durable obligations for some economic purpose or for some other reason of beneficial general intercourse.

If the United States are right in the contention they are submitting here, the obligations which those nations have incurred, will turn out

to involve a loss of what, I think, every nation regards as its most treasured possession. It will mean that they have, in most cases I am sure without knowing it, parted with the unity and completeness of their national sovereignty; that they have lost the right so much valued by every independent State to deal with all persons and things on its own soil without foreign interference or control.

When we talk about divided sovereignty, or of subjecting a nation to a servitude, which has such consequences in regard to sovereignty as those for which the United States contend here, we must not forget—I am sure this Tribunal will not forget, though it is frequently forgotten by many jurists—that we are dealing with national independence. It is no mere question of guiding or limiting and restricting the exercise of a sovereign power such as we may have in any contract or treaty between States, or in any bargain between individuals. Of course it is common ground to both the disputants here that every contract, this treaty among others, restricts the action of sovereignty. That is not the contention with which this Tribunal is now called upon to deal. It is no mere limitation or restriction upon the exercise of a sovereign power for which the United States contend. It is an absolute transfer of the power itself: and the difference between a restriction and a conveyance is one on which I need not enlarge to this Tribunal, or to any body of legally trained men. And the contention of the United States does not stop there. That is a serious matter; but the learned counsel who have appeared on behalf of the United States have felt themselves compelled by the stress of their argument to go further than that, and to make clear in argument that which was, perhaps, only implied in the written pleadings submitted to the Tribunal, namely, that they are, in their view, entitled to share in the enforcement of such regulations as they may think proper, or as may be agreed; in other words, that it is part of their right, conferred upon them by this treaty, that they should, in times of peace, be at liberty, if their right is, in their view, in any peril, to place armed forces upon the soil of a friendly Power,

for actual operation, if need be, against the citizens and subjects of that Power. I venture to say this is a novel claim; it

965 is a startling claim; it is a claim which, of course, this Tribunal would not dream of allowing, except upon the most explicit evidence that it was the intention of the parties; because, although nations may, in the unhappy course of events, become subjected to the control or domination of foreign and hostile powers, yet they do not very easily or very often consent to it. And the case for the United States, here, is that Great Britain has consented to the situation which they say has arisen. If so, then it must be clearly proved. But it is a remarkable feature, one which meets the United States at the very outset of their case, and which, still, I think they have



not succeeded in overcoming, that they have no contract in which any such condition of things as this is foreshadowed and agreed to on the part of Great Britain. They have no such contract at all. They have a contract constituting a right, creating that which they are pleased to call a servitude, and a contract, therefore, which like all others, in some degree—a substantial degree—limits what I have called the exercise of our sovereign powers; but when we go further and ask where is the contract which carries with it a transfer, a conveyance of our sovereign power—which is something more than a mere limitation or restriction—we are referred to implications and international-law, and the history of the parties, and to various other grounds with which it will be my duty to deal.

If we have agreed to such a condition of things there is no more to be said about it. The contract binds us. But the question here—and it is the whole question before this Tribunal—is: “Have we agreed?” Is there a contract, is there a bargain, between Great Britain and the United States that the United States shall possess this novel and remarkable power, one only exercised by a conquering and dominant State, or scarcely ever exercised except by a conquering and dominant State, over the territory of Great Britain?

The United States has been somewhat hard put to it to show a contract. And its very able and learned counsel have endeavoured to suggest various grounds of action which should be independent of contract. Well, now, all those grounds of action look very well and sound very well while they are being dealt with by learned counsel; but they have to be subjected to a somewhat minute examination to see whether they really carry their argument home.

The United States come into Court with two grounds of action, as I may call them. They claim this joint ownership or joint sovereignty in the territory of Great Britain, or in part of their territory, on two grounds: They said first of all that the sovereign right they thus sought to establish was a continuance of their original right as joint owners with Great Britain of the then British Empire. I understood, in reading the Case and Counter-Case, that that was put forward as a definite and sufficient reason why the United States should have an affirmative answer to Question 1. Such a ground as that was substantially independent of grant altogether. The grant in such a case, as, indeed, the United States themselves asserted, was a mere recognition of their original sovereignty—a sovereignty unbroken in one sense and enlarged, and not diminished by the revolution. That, then, was a ground independent of grant. The other ground is dependent entirely upon grant, and, indeed, is totally inconsistent with the theory of antecedent sovereignty, or antecedent rights, which the United States first put forward. They say now that there was a grant by Great Britain of a servitude, and that a



servitude carries with it, without any need for explicit statement, or agreement, but by mere force of international law, which is to be read into any contract that is made by the parties, all these consequences with regard to the sovereignty that I have just been describing.

A servitude is dependent entirely upon grant, so that we have to do here with practically two courses or grounds of action: The one independent of grant—the grant, indeed, present but subordinate, as a mere acknowledgment of an existing right; and the other wholly dependent upon grant; and a grant which apparently is to have somewhat remarkable consequences, because the grant is the concession of a liberty to individuals, but, under the skilled construction of learned counsel on the other side, it becomes not a concession of a liberty to individuals, but a conveyance or grant of sovereignty to a Government. In fact, say the United States: Because you have given our fishermen a share in your fish, you have, without knowing it, given us a share in your Government.

The grounds, as I have said, are not very consistent; but I will not stop to criticise that. I do not much mind the inconsistency of these grounds of action, because it is open to any counsel, and we all do it, and do it rightly, to adopt alternative grounds of action. When we get our story from our client we may entertain doubts as to whether the evidence may come up to the full measure of the proofs of witnesses that are laid before us, and we take care therefore  
966 to provide ourselves with good legal arguments, however the facts may turn out. But the United States have not put these two grounds of action alternatively. They have not done that. And I think they have—though I must not be too confident—I think they have abandoned the first ground of action, that which I have spoken of as a claim to joint sovereignty, independent of grant, but resulting from the continuance of antecedent rights. I think they have abandoned that. Mr. Turner, however, kept it alive for the purpose of his argument, and I therefore cannot escape dealing with it to some extent. He said, p. 1781 [p. 293 *supra*]:—

“The United States has no difficulty in admitting that its rights here are to be measured by the treaty of 1818 . . . construed, however, in the light of the history of the two countries preceding it in which this historic claim of partition”——

This partition of empire, on which he founds the division of sovereignty—

“and the contention concerning the effect of war on the Treaty of 1783 have and play a very important part.”

So, as I understand it, the legal position of the United States, if I have it exactly—and if not, I am sure I shall be corrected by Mr.

Root—everybody knows how difficult it is for any counsel to state accurately his opponent's point, although I am trying to state it as accurately as I can in order that I may deal with it effectively—is that that part of the case, and it constitutes a very large portion both of the argument and the evidence, which dealt with the antecedent rights of the United States, with their historic claims, is no longer before this Tribunal as what I have called a ground of action. That is a technical term in English law which, I am sure, is quite intelligible to the Tribunal; it means the ground which of itself, standing alone, is sufficient to entitle the party to a judgment. The partition of Empire theory, then, is not a ground of action. But, says Mr. Turner, it has an important bearing upon the construction of the document. Well, I listened with the greatest interest, as we all listened to Mr. Turner's most able and learned speech, to see how he applied this historic argument to the interpretation or construction of the treaty. And I am bound to say that the most careful attention has not illumined my mind as to how it bears relevantly upon construction. But what Mr. Turner may possibly have left imperfect Mr. Root may implement; he may make it good; and therefore I cannot treat the subject as one not worthy of further observation. I daresay if I had the very last word of all, there is a good deal of the case which I might leave alone, and say: "It is not carried home," to use an expression favoured among English lawyers; that is to say, it is not brought to a complete conclusion, and, inasmuch as it is imperfect, I do not further trouble about it. But I do not know how far Mr. Root may finish the steps of the argument where it halts in certain particulars; so I cannot entirely neglect it.

The claim itself, as I have said, is quite clear. It has been stated with the greatest possible candour and fairness, such as the United States have shown throughout the whole conduct of this case, from the first to the last. Mr. Turner put it in a sentence. He said: Our claim is to demand a voice,—p. 1975 [p. 324 *supra*]:—

"We propose to have our own voice, and our own hand, and our own participation not only in the making of these regulations but in their enforcement. . . ."

In other words; we are sovereign in the legislative sense, and our sovereign power, it being a sovereign power, is not confined to legislation, but it has also its executive rights, and therefore we are entitled to compel obedience to that which we properly require in the exercise of our sovereign authority. And, of course, that compulsion cannot be confined to its own citizens. Mr. Turner soon saw that. Again he did not shrink, any more than any of their learned counsel on that side have shrunk from the obvious logical and legitimate consequences of their argument. You cannot enforce regulations, though they be agreed to by both parties against one set of fishermen and not against



the other. Because, if the United States desires to enforce regulations at all, there is no need to enforce them, there is not likely to be any occasion to enforce them, against its own citizens; because its own citizens will be the complainants; they will be the injured parties; and the exercise of sovereign authority and force will be against the citizens of the other power concerned in the condominium. So that it is a claim on the part of the United States to coerce, if need be, by armed force, the citizens of Great Britain in Newfoundland who are disobeying regulations which the United States thinks proper or which are agreed to between the United States and England,  
967 it may be. That is the claim of the United States. And it is clear that the United States is right in saying that the reasonableness of our regulations is immaterial. That, I think, is obvious. If they are in excess of our jurisdiction, it does not matter whether they are reasonable or not; and if they purport to apply to the United States, why then, clearly, they would be to that extent in excess of our jurisdiction, if the United States are right. And therefore they are not concerned to discuss the reasonableness of our regulations at all. They may be as reasonable as you like, but, say the United States, they do not bind us without our consent. Of course, they do not mean to be unreasonable. They say they will not be unreasonable, but they claim the right not to submit or acquiesce, or to be compelled to acquiesce in reasonable regulations. So that the local power of Great Britain in this case would undoubtedly be left in a position of very serious difficulty, with this partner in its sovereignty whom it has no means of compelling to an agreement. The contract between them has overlooked all the difficulties that might arise from such an unusual and such a difficult situation.

Of course, the United States say they will be reasonable. They say it sincerely, of course, that they mean to be reasonable. But what is the characteristic of a sovereign power? What is the characteristic, for instance, of that which in private life is analogous to a sovereign power—ownership? The owner of property is not under any general compulsion of law to use his property reasonably. There are some things that are unreasonable, and if he does them, the law will prevent or punish him. But as long as he keeps within that very limited range of reasonableness prescribed by the law of the country in which he lives, he has an immense range for unreasonableness. That is the condition of the private owner. It is equally the status and the right of the sovereign power, which may be as unreasonable as it likes, even within a wider scope than that which is permitted to the private owner.

And what is reasonableness to a sovereign State? We had a very excellent illustration of it in the argument, most lucid and interesting, put to the Tribunal by Mr. Elder, in relation to the conduct of



Newfoundland and the United States. There could not be a better case on which to found observations as to the limits of reasonableness allowed to sovereign or quasi-sovereign powers. Mr. Elder complained that Sir Robert Bond had been unreasonable. Well, of course, we have not had the case, yet, for Sir Robert Bond. Mr. Elder said: "You are refusing to sell bait to the fishermen of the United States." Of course he did not dispute what is perfectly clear on the record and the history of the matter, that Newfoundland is entitled, if it thinks fit, to prohibit its citizens from selling bait to the fishermen of the United States. That is one of the circumstances, though it is only in passing that I make the observation, which rather tends to deprive this right of its supposed character of a servitude. It was not a very full right. It was not given as if to a sovereign State. It was a very limited privilege, because when it was being granted, the United States asked, or demanded, the right to purchase bait in Newfoundland waters, or on the Newfoundland coast, and that was refused—a significant refusal. Great Britain said: "No. We will give you this very restricted liberty, but we cannot and will not give you any right which approaches the character of a trading right." Why? Because trading rights in those days (and I am sorry to say in these days) were treated as a subject-matter of bargain. An operation of trade, which, if it is a normal operation of trade, benefits both, was treated by each side as an obligation or relation not to be entered into except on terms. States then and still (even those states that Mr. Elder would regard as types of reasonableness), said: "We will not enter into this beneficial trade relation with you, unless you do this or that or the other thing." And therefore the right to sell bait was withheld. So that it has remained in the hands of Newfoundland an element in any trade bargain that it might hereafter choose to make. I say "in the hands of Newfoundland;" of course in those days it was in the hands of England. And therefore Sir Robert Bond, when he got into fiscal difficulties with the United States, found that to be his weapon. The United States, for excellent reasons, that is, reasons excellent from the point of view of those who adopt such a policy, said: "We want to keep our market for fish for the benefit of our own seamen and fishermen. We do not want Newfoundland fishermen to come and compete in our market with our fishermen." And so they put on a tax—it does not matter what its amount was; a very heavy one; they had this tax on and kept it on except during the treaty periods, concerning which Governor Des Vœux says, in one of these letters, that it was in effect a prohibitive tax against the fishery products of Newfoundland.

What did Sir Robert Bond do? He said: "You will not let me have my market; and I will not let you have your bait." That was all. "You use against me your fiscal powers for the benefit of

968 your seamen, for the benefit of your fishermen, and I will use against you my fiscal powers for the benefit of my fishermen. You will not import my fish, and I will not export my bait."

Now, if there is anybody entitled to treat a subject of this kind with an air of sovereign impartiality, it is, I think, the representative of Great Britain. I am bound to say, in viewing the conduct of these two high contracting Powers—I wish to speak very respectfully of Sir Robert Bond, and I say Sir Robert Bond rather than Newfoundland, because when Newfoundland came to have a chance of pronouncing on the policy, it gave a verdict of a very emphatic character, which prevents us perhaps from having the pleasure of Sir Robert Bond's society here to-day—when these two high contracting parties began this quarrel, what was there to say about reasonableness? There are those—I hope there are those—who would say: "You are equally unreasonable. There is not a pin to choose between you. And for an operation that ought to be one of common benefit and peaceful intercourse, you are both of you substituting one of war and economic friction. But if one of you claims to be more reasonable than the other, then I think one is entitled to ask: Who began it?" And, as it happens, Mr. Elder, in his admirable statement of the case, did not begin at the beginning. He began with Sir Robert Bond's refusing to sell bait. But there is an earlier step. There is the United States refusing to let in Sir Robert Bond's fish. And yet they are both exercising their sovereign powers within their rights; and I say from their point of view, and from the point of view of their fiscal policy they are both reasonable, absolutely reasonable; and yet it is a kind of reasonableness of which we do not want too much.

The United States, therefore, when they asked for a sovereign right, compel us to consider: How will it be used? Reasonably, says the United States. No doubt; but what is reasonableness? What is your idea of reasonableness? On that I think I should like the views of Sir Robert Bond. But anyhow, the element of unreasonableness is brought within very distinct and useful limitations here by the agreement of the parties. They have made an agreement in article 4, to be found at p. 6 of the United States Case Appendix, to which I wish to draw attention, because there arises upon it a point which I think I ought to deal with at once, namely, as to how far either of the present disputants may be under compulsion to refer their conduct subsequent to this Award to this Tribunal. I think the position of Great Britain is quite clear. I am not quite so clear—I do not profess to speak with any degree of positiveness about it—but I am not quite so clear as to the position of the United States. Great Britain consents to this article, as does also the United States:—



“The Tribunal shall recommend for the consideration of the High Contracting Parties rules and a method of procedure under which all questions which may arise in the future regarding the exercise of the liberties above referred to may be determined in accordance with the principles laid down in the Award.”

Those are very important words. The rules and procedure which this Tribunal is empowered to lay down or recommend are in order that future questions may be determined—How? Not anyhow; not with an absolute and unrestricted discretion on the part of those who may follow the present Tribunal in deciding these subsequent disputes; not an absolute discretion, but “in accordance with the principles laid down in the Award.”

Now, if the Award on Question 1 be in favour of Great Britain, it will be that Great Britain is entitled to make reasonable regulations. We have submitted to reasonableness as a condition in the question; but I think it would be implied against us, whether we had submitted to it or not. So that, if the answer to Question 1 be in favour of Great Britain, any regulations that we make must be reasonable regulations; and if this Tribunal so decides, then the reasonableness of those regulations, of course will be within the competence of this Tribunal; because they will have decided by their Award, on this hypothesis, that we are entitled to make reasonable regulations, and they will also be entitled to say whether or not we are acting in accordance with the principles laid down in the Award.

But if the United States should succeed, then what will be the principle laid down in the Award, if their contention be adopted? It would be that they are under no compulsion to accede to any regulations whatever. I think when I deal with this question of regulations, which I am going to try to deal with shortly, because I know how much the Tribunal have heard about it, and how thoroughly they understand it, I shall only deal with it as I say, in trying to cast some light on particular features of it. When I come to deal with it, I think I shall show that upon their contention it is within their right under the treaty, and indeed may very well be within their existing opinion, that no regulation is necessary. Certainly their argu-  
969 ment is that they cannot be compelled to assent under the treaty; that the treaty provides no mode whatever by which their consent to any regulation can be compelled. It is a sovereign discretion. And, therefore, if they have an Award in their favour, the matter seems to me to be beyond the competence of this Tribunal. This Tribunal can decide whether or not regulations are reasonable, but if it decides that one of the parties has the right in its uncontrolled sovereign authority and opinion to say that no regulations are necessary, then I apprehend, however much the other side may want regulations, it will have not *locus standi* before this Tribunal,



because the Tribunal would say: "We can only decide in accordance with the principles laid down in our Award, and the principles laid down in our Award were that the United States could treat this as an unregulated fishery. And therefore you must take the consequences of it." The Tribunal that would sit—it might not be the honourable Arbitrators whom I have now the honour to address—but whoever might sit, being nominated as their representatives, would then be compelled by your Award, by the principles laid down in your Award, to say to Great Britain: "You have no remedy. The Award decided that you had made an improvident bargain, a bargain in which you failed to reserve any rights of testing the reasonableness of their conduct, and therefore you must accept the consequences."

I submit that with some hesitation, because I can imagine a good deal to say on the other side against it. I am not putting it before the Tribunal as a positive argument, an argument which I advance with any great degree of certainty, as one absolutely conclusive, and having nothing that can be urged against it, but I think the balance is in favour of the conclusion that I have suggested. And therefore, although Mr. Turner said that the United States were as willing as Great Britain to submit to this Tribunal—and of course a statement like that made by counsel for the United States would never be neglected or repudiated by the United States themselves—still, as a matter of law and strict argument, I think that his promise went beyond the case as he presented it on behalf of the United States.

The first question, therefore, that arises, and it is one which has a most material bearing subsequently on every part of the case, is: Is this a regulated fishery? Are the United States demanding power to treat it as an unregulated fishery? Again, I have listened with great care to the argument of the United States in order to see exactly what their attitude was on that. Do they mean, if they get the power for which they ask, to use it for the purpose of regulation, or do they think that regulation is superfluous?

Mr. Root has said in one of his letters that he is very willing to co-operate with Great Britain for the purpose of regulation; and of course there is no one whose regulations we would accept more implicitly than his; but we cannot treat this from the point of view of the good-will of any particular Government. Governments' circumstances change, and Governments change. The lives of Governments are not eternal, and their principles are not immutable. We cannot quite tell what state of things might arise that would make it convenient or probable that the United States might take an attitude inconvenient to Newfoundland again, as it has done before. And so we have to look at the matter as a matter of strict right; and looking at it as a matter of strict right, it seems to me that they are claiming the right to demand an unregulated fishery; and looking at it as a

matter of evidence, the impression left on my mind is that they do not think regulation necessary at all.

For instance, take what was said by Mr. Turner in reference to Professor Huxley's report. Some references have been made, not very much, because I think my friend Sir Robert Finlay rather treated the necessity of regulation as being obvious—to one or two of the documents to which I should like to make some slight reference again; but I think he treated regulation as being a thing which really did not require much argument, so far as the question of its necessity was concerned.

Mr. Turner, however, read an opinion of Professor Huxley, in which, I think, the enormous fecundity of fish was referred to. I have not troubled to look at the reference, but it is well within the memory of the Tribunal. I think some scientific man with a leaning toward statistics has said that a herring was the potential parent of about half a million other herring. Well, I do not think that the families of herrings multiply at quite that rate; but still, no doubt, there is an enormous rapidity of increase on the part of these lower forms of living organisms. And Mr. Turner argued from that, or I thought he meant to argue from that, that regulation was unnecessary; but it may have been, on looking at his speech, that its importance was exaggerated. Well, we cannot afford to let the question rest there, because the prosperity and existence of this fishery is not merely an important question for Newfoundland, but a vital  
970 question. No fishery, no Newfoundland. And therefore it cannot be left open to doubt in any way whatever as to whether regulations ought to be made or not. Those regulations, however, referred simply to the question of the preservation of the fish. There is another branch of regulation equally important, and that is the preservation of order among the fishermen. On that Mr. Turner spoke again, I think, with a little uncertainty of sound. He seemed there to say that the United States might be willing to concur in regulations of that character; but of course he could not and did not pledge the United States to do anything of the kind.

I must, therefore, just say a word or two, and they shall be very few words, upon this question of the necessity for regulation. I am not dealing with it as what may be called a matter of prejudice, or anything of that kind. I am dealing with it because of the application I am going to give to these observations later, when I come to the question of strict construction: Is regulation a necessity, and is it a necessity of such a character as that I am justified in saying that it could not have been absent from the minds of the parties who made this treaty; and that, as it could not have been absent from their minds, they must have dealt with it in one way or another? Mr. Turner says they dealt with it by impliedly creating a dual control.



I say they dealt with it by leaving the power of regulation where it was.

First of all, the first question, therefore, to which I must devote a few remarks, is: Was it so necessary as that I am justified in saying that both parties must have thought of it? Well, there is a short answer to that, without going to all the references in the appendices—and I mean to keep as clear of these appendices as I possibly can—and it is this: The fishery was, in fact, regulated for long, regulated minutely, regulated severely, by acts and statutes which touched the Newfoundland fishermen.

Mr. Turner says they did not touch his fishermen; they knew nothing about them; and, therefore, he says: "I am not bound by them, and they are not to be treated as affecting my rights, or as having any bearing whatever on the question of my conduct." Well, for the moment, be it so. I will deal with that in another branch of the case. But, anyhow, they affected the Newfoundland fishermen. They visited them with heavy penalties, and, as I say, they touched them at almost every step and stage of their industry, where they were to fish, who was to have priority among them. The vessel that got out first from Great Britain had the luck to see its captain treated as the admiral of the whole fishing fleet, English and American. There were regulations of the most minute character, no doubt, made by him. Depend upon it, a fishing admiral is not a person who belittles his authority, and I have no doubt that when he was entrusted with quasi-legislative powers there was nobody ever caught a herring on that coast that did not know something about him and his powers. It is clear that legislation, therefore, was necessary for them. Would they have submitted to it if it had not been vital? If the fish had been as accommodating as Professor Huxley thought they always are, and no amount of destruction can do anything but just stimulate them to fresh efforts, then depend upon it we should not have had much regulation. The fishermen would have said, in Newfoundland: "All this is unnecessary; don't worry us with your statutes. Providence does everything we want; it repairs the ravages of our seines, and regulations are totally superfluous." They did not say so. They submitted to them—aye, and in the United States, where they were not forthcoming, they clamoured for them—they clamoured for these regulations.

There are two reports, two very important and useful reports, which deal with this point. They have already been referred to, and I do not think that I need trouble the Tribunal with the reference, because I am sure they will forgive me for just recalling them to their minds in substance. I have a few passages extracted from them, but I only want to deal with them quite generally, and therefore I am dealing with them without actual reference.



The first report was made in 1872 by the United States Commissioner, Mr. Baird. I will just give the reference, British Counter-Case Appendix, p. 181, in case the Tribunal wants it. But I can state generally what they have already heard, as to the effect of that report, which Sir Robert Finlay dealt with. The United States Commissioner was appointed in order to enquire into the diminution of the fisheries which had become serious, which had become a matter of national concern. Apparently the fish had not been living up to Professor Huxley's opinion of them, and they had been going down at a very great rate. The Commissioner said that the decrease was due to traps and pounds. I do not stop to enquire what they are; they are things referred to in the Newfoundland statute, and the other statute. And he says that the use of these things must be regulated, and above all there must be a close-time. He

971 says that it is desirable that the several States of the United States should pass these regulations. Apparently there is no authority on the part of the United States Government to deal with regulations for all the maritime States. I am glad that the Tribunal has the great good fortune to have among its members one who can speak with authority on any question affecting the United States law, and therefore I speak with great diffidence. I have read the United States constitution—there may have been subsequent amendments—but I understand that the question of fishery regulation is not among the subjects there given over to the central power. And Mr. Baird, in 1872, conscious of that, says that he wishes the States to make regulations; but if they will not or can not be got to agree, then he recommends that the central power should forbid the landing of mackerel or other fish caught by any of the prohibited means, or caught during the spawning season; showing how important he thought it was that there should be this close-time, which is one of our disputed regulations. It is a regulation which the United States say touches the very matter of the time and manner of fishing, and therefore they will not agree to it; therefore they will not acknowledge our power with regard to it. Now Mr. Baird says that is what you must have; he says regulation of all these traps, &c., and the close-times, is not a merely expedient matter, but a vital matter.

There is a still more striking report issued later by the Deputy Minister of Fisheries for Canada who gives (the Tribunal will remember it was read) a most graphic account of the result of non-regulation upon the United States fisheries. He sets out in a schedule (I only mention this by way of reminder) to his report the report by Professor Browne Goode, which, in the most emphatic, and, I was almost going to add picturesque, terms, deals with all these difficulties, and explains how they must be dealt with. He is a United States man, although the report appears as an appendix

to a Canadian document. He tells of the petitions to Congress from United States fishermen, among others delegations of fishermen from Gloucester, Massachusetts; and they give figures which are certainly calculated to impress the intellect and the imagination. He says of some of the methods they had of catching fish by purse seines and so on, they would sometimes destroy as many fish as would fill a hundred barrels in order to get, I think he says in one case, only one barrel. They were destroying fish out of all proportion to those which they caught, and he says in one place: "Half the catch sometimes are killed before spawning." So that the possibility of multiplication is destroyed by catching the fish at a time when by every law they ought to be left alone.

THE PRESIDENT: Please, Mr. Attorney-General, is not the divergence of opinion between Professor Huxley and Professor Baird perhaps partially to be explained from some difference in their point of view? Professor Huxley views the case more from the zoological and scientific point, whereas Professor Baird looks at it more from the practical and economic standpoint. It may be that in consequence of the enormous powers of propagation of fish the number of fish in the whole of the oceans of the earth is not diminished, whereas the number is diminished on certain coasts.

SIR W. ROBSON: I am much obliged, Sir. That had not occurred to me, but I have no doubt that accounts for the difference of opinion and the difference of statement of the two. They are each of them looking at it from different points of view. Professor Huxley is thinking rather, as the learned President has said, from the zoological point of view. He says that, at all events, there is no fear that the fish, as species will cease to exist. They may be driven away where it may be difficult to find them, but they will still exist and they will exist somewhere in large numbers. Whereas Mr. Baird is dealing with the question of the fish there, as present in that particular habitat.

Well now, this establishes for the purpose of my argument, what I have called the vital necessity of regulation for the preservation of the fish in that fishery.

I need not dwell, I think, also upon the equal necessity of regulations for the purpose of observing order. That is so apparent, I do not need to dwell upon it at all. There is where the question of sovereignty comes in with such force. How can you divide sovereignty? How can you have, with any kind of security to a community a dual sovereignty at all? We have had several examples of them in history, but they have not lasted long. How can you have a dual sovereignty with regard to the staple industry of a country—because here we are dealing with a staple industry of this little island? Sir Robert Bond, with a fine fervour of patriotism talks of



it as the "Mistress of the northern seas." It may be from the  
972 strictly cod-fishing point of view, but it is only from that  
point of view; the cod-fishery there of course is everything,  
everything in the world to Newfoundland. Directly or indirectly  
everybody is concerned in it.

Well, how can you have the law under which the population of  
Newfoundland is to get its daily bread, divided at the very source by  
a double sovereignty, and then divided afterwards throughout in  
every executive act by a double sovereignty, which may or may not  
agree? It is an impossibility. However, I am simply concerned  
here in establishing the necessity of some system of regulation.  
There is one point which I see I had omitted, which has a very im-  
portant bearing on the question I had already dealt with, as to  
whether or not the United States think regulation necessary.

The Tribunal will remember a letter which has been often quoted,  
in which Lord Derby, writing to someone, I forget whom, was deal-  
ing with the case of the French coast—and, the French coast, as the  
Tribunal well knows, was upon a very different footing with regard  
to fishery, to the south coast where the Americans had their privilege.

The French had what they contended was an exclusive right, and  
what was very like an exclusive right. It was a right to fish there  
without being "interrupted" by our "competition." They said, that  
means that you must not compete. We said that means only that we  
must not interrupt by our competition. Well, I think competition can  
scarcely get along without interrupting, and though I am not going  
to pronounce any opinion upon the French claim which exercised  
English lawyers for so long, I will simply say that the French had  
something to say for themselves upon the question of the exclusive-  
ness of their right.

Now, dealing with that coast, Lord Derby said, in some of these  
many statements to which our statesmen commit themselves, often to  
the inconvenience of those who have afterwards to defend their  
action, the situation on the French coast is somewhat analogous to that  
of a "common sea." And, Mr. Root, in one of his despatches, caught  
hold of this, and said that the same observation (I am not quoting his  
exact words, but I think very nearly) is applicable to the situation  
created by the American right.

Now, what is a "common sea"? A common sea is a part of the  
high seas subject to no regulation. No one claims dominion over it.  
No one claims ownership in it. It has no sovereignty. It is one of  
the few places in the world where you can escape government, unless  
you are in a boat. You do not escape it as long as you are under a  
flag. But, still, there is no government in the high seas. If we are to  
take Mr. Root's despatch literally (I do not know whether he would  
desire us to do it or not—perhaps not) if it is to be literally construed,



then there is to be no regulation on the Newfoundland coast, because it is analogous to a "common sea" where regulation of course would be *ultra vires* of any Power at all.

Then, what is the situation at which we have arrived so far?

THE PRESIDENT: Please, Mr. Attorney-General, is not the expression "common sea" in this connection rather to be understood as a sea common to the British and French?

SIR W. ROBSON: I think it is used in reference to that argument, as something more than common to British and French, or under jurisdiction of British and French. I do not think it means that. I think it meant there "common" in the sense that neither party has jurisdiction over the other. However, that is the sense in which Mr. Root is using it. Mr. Root is there dealing with the question of jurisdiction, and he says, "I call this sea a common sea." What is the good of his calling it a common sea unless he means a sea in which there is not the jurisdiction for which you are contending? It is open, however, to either meaning. I guarded myself by saying I did not quite know what meaning Mr. Root might attach to it when he comes to deal with it; but taking it in its context, and having regard to the point to which he is directing his observation, it seems to me "common sea" meant a sea clear of the regulation which you are now claiming to put upon it.

THE PRESIDENT: I understood from Mr. Root's letter it was referred to in the sense of a sea common to British and American regulation; that in the one case the regulations were to be made in common by France and Great Britain, and in this case the regulations were to be made in common by Great Britain and the United States; but of course it is open to your construction.

SIR W. ROBSON: The words of Lord Derby are: "Analogous to a common sea." He dealt with the words "common sea" as an abstract term. He was likening this sea to a common sea, so that apparently one construction that might be put upon the words is that he was limiting it to a sea where regulation would be inapplicable. However, that is a merely verbal criticism, and of course I will accept directly any construction Mr. Root puts upon his words, generally clear enough, and I am bound to say, if they are not clear in this instance, it will be the first. I think they were a little too clear, however, for Mr. Turner and Mr. Warren, who dealt with them later on. They find statements which cannot be avoided or explained away, but have to be boldly met.

The point, therefore, which I have reached in my argument now, comes to this—regulation is a vital necessity. It must have been present to the minds of the framers of the treaty. They must have intended to deal with it. I say they dealt with it by leaving the power of regulation where it was.

The United States have not yet admitted in the course of their argument that regulation is a vital necessity. They may admit it later on. They have not precluded themselves by anything they have said from making that admission, but they have not admitted it yet, and we are entitled therefore to be very careful and cautious in regard to the way in which we deal with it at present.

Well, I now come to another matter which I think is preliminary perhaps to a strict examination of the words of the treaty itself, which I hope to be able to deal with soon.

I want to look for a moment at the nature of their antecedent right upon which so much stress has been laid. I confess that I can scarcely justify myself on the ground of relevancy or materiality, because I do not see what the question of antecedent right has to do with the construction of the alleged servitude, and it is upon the servitude alone that the United States now formally base their case. However, as I have said, I have to be followed by Mr. Root, and I do not know how any part of the argument to which we have listened may be used by that very eminent advocate, and therefore I must not neglect it.

What was the nature of their antecedent rights?

I can deal with it very briefly, and I think with very few references.

Each colony, before the revolution, had a right to regulate its own fishery, without control from any other colony. Of course, some of the colonies were what we call Crown colonies. Newfoundland did not get its Legislature until 1834. They were regulated by the central Government through a local governor, who stood in the place of course of the Executive Assembly, or governing power of the other colonies, to which charters had been given, and to which a larger measure of local freedom was allowed; but each colony was quasi-sovereign, I will say, of its own sea-board.

There were two of the colonies, and think only two—it does not matter whether two or more—in which there was undoubtedly by statute a general right of fishing given to British subjects. For instance, in the charter of Massachusetts. The Tribunal will have seen it. There, in 1691, a new charter was given. The English Kings had been very fond of giving away public rights by way of exclusive monopolies to their favourites, and they had undoubtedly, in some of their colonial charters, not foreseeing the great future that lay before these territories, acted in the spirit of their times somewhat inconsiderately, and had given monopolies which were very detrimental to the subjects of the rest of the Empire. For instance, in New Plymouth and New Hampshire we had a colony there under a charter empowering it to sell its fisheries to a syndicate; but there were at least two of the colonies where a more beneficial rule prevailed. In Massachu-



setts there was a general right of fishery given to all the subjects of the King upon that coast. But it is important to observe that that general right of fishery given in 1691 was followed in 1692 by a regulative Act. It was a right of fishery given subject to the local jurisdiction, and the local jurisdiction was very strict.

I have given the Tribunal the reference to the statute of 1692, and I do not propose, unless I am asked, to go through these references, because I think at this stage of the case I may assume to refer to them without dealing with every reference, because I am only referring to them generally as the steps in an argument.

They at once proceeded to regulate, so that in this case, where the colonists had the right to fish, the right upon which so much stress has been laid by learned counsel for the United States, it was a right accompanied by and subject to the local jurisdiction,—very important when we have such immense stress laid upon this very thing by the treaty of 1818 as being a survival, a continuance of an antecedent right. I should be quite content to take the whole case on that footing. It would save a good deal of argument. I am afraid I must not run that risk.

However, that was Massachusetts. In Newfoundland also a right was given to fish, a right given merely to the inhabitants, 974 but there were practically no inhabitants. A right was given there in 1699 by a statute which in terms appears to apply to all British colonies, but which is afterwards explained by another statute in 1775, as being intended to apply only to British subjects from Europe, giving special rights and priorities to that class of subject. However, I do not need to dwell upon those minor distinctions, because they do not affect the general line of my argument.

When the right is in general, in the case of Newfoundland by statute, as it was in general to British subjects in the case of Massachusetts by charter, there also is the accompanying obligation to obey the regulations.

Then there, in each of those cases, where they enjoyed an antecedent right, it was a right given in the terms and enjoyed in the terms for which Great Britain is contending here to-day.

Those are not the only cases. In other instances there were no rights possessed by any colony on the seaboard of any other. Take, for instance, Labrador. I am going to deal with the length of the enjoyment also, as well as the nature of the rights, and we will see how this historic case, pointed out as containing some grievance or hardship on the part of the United States, contracts—how it vanishes. What was their antecedent right in Labrador? None. They had no right. Then what about Nova Scotia? There the record which has been put before the Tribunal shows that there was a pen-



alty by an early statute (I had better give the date here—a statute of 1665), a penalty on all persons going into the jurisdiction and fishing without a licence. The Nova Scotians had a little of that local jealousy which is only one aspect of local patriotism. They did not like the New England people to come and fish off their coasts without paying something for it, and so no vessel is to come from New England to the Nova Scotian jurisdiction without a licence.

So that the antecedent right there was not a very valuable one. They had to pay for it, and when they got there they were subject again to the local jurisdiction.

So that there was nothing in the nature of ownership, there was nothing in their antecedent right upon which they could found any claim to dominium. That claim to dominium comes entirely from the somewhat fervent literature with which Mr. Adams (and I speak very respectfully of him, of course) enriched the controversy at that time. He was a great patriot and a great man, but when he stepped into the sphere of legal inference I am not quite so sure that he shone altogether at his best. And, great patriots do not always make very great historians. I think, as one comes to criticise these despatches, one may occasionally make that observation of Mr. Adams, although with great respect of so great a man.

But there was nothing then upon which any claim of ownership could be founded, in the rights of these colonies, antecedent to the revolution. They enjoyed a limited and precarious liberty, subject absolutely to the local jurisdiction.

Well now, how much did they enjoy of that with regard to the inshore fisheries? We have from Mr. Turner many extracts in which the United States Commissioners lay stress upon their claim to the fisheries. They do it in earnest terms, fervent terms, just terms. I make no complaint whatever of the language they use with regard to the fisheries in the high seas, but it was the fisheries in the high seas they were talking about.

Any one listening to Mr. Turner's very eloquent speech would have thought that really here the fisheries in dispute before this Tribunal were the fisheries of which Mr. Adams had been writing in such fervent terms. Not at all. The fisheries about which Mr. Adams made his eloquent appeals were the bank fisheries. He cared very little indeed, nobody cared much, for the inshore fisheries, which are the subject of enquiry here. And, throughout the whole of the United States Case, as presented in their documents, as put forward in the able speeches of their counsel, there runs this fallacy of applying the language, appeals, principles and documents, referring to the fisheries in the high seas on the banks of Newfoundland, as if they referred to these scrappy little fishing rights which are the subject of enquiry before us.

Now, let us confine our attention for a few moments to these fishing rights and ask what antecedent enjoyment the colonies now forming the United States had had in regard to these fisheries. What did they have? Really, you will be astonished when you come to look at it very closely.

We are concerned here with fisheries on the coast of Labrador, the western coast of Newfoundland, southern coast of Newfoundland, and the Magdalen Islands, in the Gulf of St. Lawrence, and part of Canada.

Now, what is the enjoyment which they had of them?

Take Canada first. Canada was only ceded in 1763. The revolutionary troubles began in 1774. I think that is the year in 975 which the historic tea was emptied into Boston harbour, and made a brew that we have not yet finished drinking. So that there was only from 1763 to 1774, eleven years, during which there could be any enjoyment of the fisheries so far as Canada is concerned. And, I should doubt very much that they troubled the Magdalen Islands during those eleven years. Their interests and their attentions were concentrated on the bank fisheries, far away from the Magdalen Islands.

But, still, they do appear to have used them in some degree. But what is said about the degree of user that they had of them? What is said in the document with which the Tribunal is now so familiar? Everybody says on the United States side at that time that they made very little use of them, that they were very little good to them, that perhaps their principal advantage was that they had been found rather inconvenient to England, which was a perfectly sound reason from the international point of view. For instance, Mr. Adams writes to Mr. Russell:—

“This privilege,” (that is the fishing within 3 miles) “without being of much use to our fishermen, had been found very inconvenient to the British:”

I will give the reference to that, which is British Counter-Case Appendix, p. 162.

Therefore, without being of much use to the United States fishermen it was of considerable use to the United States diplomatists; but as to the user by these hardy fishermen whose rights we are supposed to be hearing in this question, I doubt if they ever went near the Magdalen Islands in the eleven years prior to the revolution. Now that refers to the Canadian fisheries.

Now, next, what about the west coast of Newfoundland? That, as we know, was a coast over which the French had especial rights under the Treaty of Utrecht, which had been reaffirmed under the treaty of 1763, so that there would not be much American fishing there. There



was not much English fishing. We could scarcely catch a herring at any time on the west coast of Newfoundland without danger of diplomatic difficulties with France. So that probably, I should say certainly, there had been no user there.

Well then, what about Labrador and the north coast? Before this treaty, certainly before the revolution, before the treaty of 1783, no United States vessel had ever been near Labrador, none. They had no user.

Labrador is rather a striking instance, so that I may give the reference. United States Case Appendix, vol. ii, p. 1194, a report made by Mr. Sabine. We all know his report very well. He says there was no fishing on Labrador until after the revolution:—

“As I have examined the scattered and fragmentary accounts of Labrador, there is no proof whatever that its fishing grounds were occupied by our countrymen until after we became an independent people.”

And there is another passage to which I do not think I need trouble the Tribunal to refer, in which it is said that it was not until the very end of the eighteenth century that any American fishermen went to Labrador.

Then what about the southern coast of Newfoundland? That is the only remaining bit of fishery. There there had been a statute, and we have had it quoted again and again, the statute of 1699, which appeared to give general rights to colonists to fish off Newfoundland; but in 1775, that is after the troubles began, a statute was passed, no doubt during the time of hostilities, and animated possibly by some spirit of hostility—in 1775 a statute was passed by the British Imperial Parliament limiting that right to British subjects, and saying, that the right to dry and cure shall not be exercised except by British subjects. It says [British Case Appendix, p. 544]:—

“And in order to obviate any doubts that have arisen, or may arise, to whom the privilege or right of drying fish on the shores of *Newfoundland* does or shall belong, under the before mentioned Act, made in the tenth and eleventh years of the reign of King *William* the Third, which right or privileges has hitherto only been enjoyed by His Majesty’s subjects of *Great Britain*, and the other *British* dominions in *Europe*;”

So that, when we come to think of the tremendous case made against us about this antecedent right, and how important it was, let us see what was said about it. It was said, I think, that they had an equal right to those fisheries. P. 9 of the United States Case:—

“The people of the Massachusetts Bay Colony and of the other Colonies had continuously and freely resorted to these fisheries and exercised unrestricted fishing rights”

976 Then, they claim the “equal rights of joint owners” with Great Britain and the other British colonies and that these



rights were acknowledged in the treaty of 1783. They had, as it now appears, no rights in the legal sense there at all, except their right to fish there, or to fish on the coast board of certain colonies, subject strictly to local jurisdiction. That is the only right they had, and when we come to their enjoyment, as far as these fisheries are concerned, it is no exaggeration, or very little exaggeration, to say that they had none. They had had some enjoyment, but none of the extent and substance that one might suppose them to have had from the speeches which have been delivered on that part of the case.

THE PRESIDENT: The last statute that you have been referring to was one of the Government of Lord North?

SIR W. ROBSON: Yes; I am putting it in evidence in order to show that the inhabitants of the United States did not enjoy on the coast of Newfoundland the right of free fishing; but, still, it is subject to the observation that it is a statute passed at a time when the two nations were at war and that therefore it is to be received *cum grano salis*. But, to take the best of American evidence, that submitted by one of the American negotiators before the Treaty of Ghent, from the year 1783—I am dealing with the period antecedent to 1783—there was very little enjoyment of the fishery; subsequent to 1783 there was some. Mr. Russell says, at p. 154 of the Appendix to the Counter-Case of Great Britain, that:—

“From the year 1783, to the commencement of the present war, the actual advantages derived from the fishing privilege by the people of the United States, were, according to the best information that I can obtain on the subject, very inconsiderable, and annually experiencing a voluntary diminution.”

Well, now, that takes away the last shred of supposed hardship on the United States. They have put their case as being that of a nation enjoying an ancient and hereditary right, invaluable to its citizens, and one which they really must insist upon enjoying as long as the ocean slept, or did not sleep, in its rocky bed. Now, it turns out that they had no rights of ownership at all, that they were always subject to the local jurisdiction and that they had a very little share—practically none—before we gave it to them by international treaty in 1783.

There is just one observation I must make, therefore, before I leave this point of antecedent right. The United States is now asking that it shall have a right to fish without regulation, or without our regulation, on these coasts by virtue of this historic part of the case. What would the other colonies have said and what would the United States have said, when they were colonies themselves, supposing a colony had come and said: We are given by statute the right to fish on your coast? Supposing that Quebec had gone to Massachusetts

and said: We have, by the statute of 1692, a right to fish as colonists and that statute gave us the right of co-sovereigns; it is a right, which, if we are to enjoy it at all, we can only enjoy free of your regulation; we do not trust you. They might have foreseen some Sir Robert Bond of the future and they might have said: We will not trust our rights to your regulation, and therefore, we claim condominium with you in your sea-board. Massachusetts would, of course, have resented it. No colony would have laid such a claim to any other colony, and yet the United States are seeking now to subject those who were once their fellow-colonists to this servitude by reason of the old colonial relation; that is so far as they are depending and relying upon the historical part of their case. When one comes to state it, it really disposes of the United States argument altogether. Can it be founded on history or can it be founded, as alleged, upon international law?

I come now to the question of regulation subsequent to 1783, and, of course, the importance of that is obvious, because it is not merely an admission on the part of the United States, but it is a construction put upon the contract of 1783 by the parties to that contract. If, after the treaty was made, conferring this right upon the United States, the parties deliberately adopted and applied the same construction that would, according to common law—certainly in an international tribunal, which is less bound than municipal tribunals by technical considerations, but even with respect to municipal law—be treated as binding. Both parties construed the right under the treaty of 1783 in the same way as being a right subject to local regulation. Therefore, the question as to whether there were regulations or not is of great importance. It is one of the issues of fact in the case which might quite easily be isolated from other arguments and

issues of fact and be treated as deciding this case one way  
 977 or the other. Were there regulations after 1783 at all? Well, nobody, except lawyers, knows what can be contradicted. We, standing here, are not ordinary persons at all, but an ordinary person would say: Well, surely, you are not going to argue about that. Are your statute books still in existence, are you guided by them, can you read them?—because all you have to do is to turn them up from 1783 onwards until 1812 and see whether there are any regulations. My friend, Sir Robert Finlay, gave us any amount. He read one after the other, and I do not want to go through them again, and there will be no suggestion that I should go through them again with the same particularity as he. I shall deal with them very generally indeed. But how did Mr. Turner meet them? We had to wait until we heard Mr. Turner, because the United States indicated that this was a question of fact best dealt with orally, and that it would be



dealt with orally. I will refer the Tribunal to vol. iv of the Proceedings, p. 2729 [p. 448 *supra*]:—

“THE PRESIDENT: I should like to ask you, Sir: Were there, in 1818, some regulations concerning the exercise of the fishery in force in the British dominions in North America?”

“MR. TURNER: I do not think there were, sir. Learned counsel read to the Tribunal, at great length, from very ancient proclamations of the Governor of Newfoundland, and ancient Orders in Council, and very ancient statutes, making provisions with reference to various matters in Newfoundland and the other waters; but it is exceedingly doubtful whether, under any constitutional system, they could be said to have been still in force in Newfoundland waters in 1818.”

It is quite true that my learned friend, Sir Robert Finlay, read some orders and proclamations which were ancient. Well, we cannot help the antiquity of our Empire. Many of our laws were passed very long ago and have been left untouched, because, although in modern times, and under modern influences, we are always altering our laws—I do not say we are always improving them—but we are always altering them; in those ancient days they did not alter them so much. There was no exigent and democratic parliament always demanding some fresh law in order to meet some condition that might be met, with a little patience, without that trouble. Therefore, our laws lasted a long time. While they are useful they are ancient—very ancient—but I do not think that makes them less effective. We have a constitutional habit of treating the antiquity of a law as a tribute to its usefulness and efficiency, from the fact that it has met its purpose and does not seem to need to be altered. But, is it correct to say that they were simply ancient regulations in the sense that they were not then in daily service and operation? Mr. Turner goes on:—

“They were regulations about throwing ballast in bays and harbours, regulations about gurry grounds; I believe there were one or two ancient regulations about that; and regulations about the order of precedence of vessels coming from England, and matters of that kind; but those are not regulations in the sense that we are talking about regulations here.”

Well, Sir, the regulations covered everything. They covered questions about seines, about taverns—a very important question with a very direct bearing upon the conduct of the fishery proceedings—about close seasons, about the size of mesh, about how and where to put their nets, about inbarring herrings, about Sunday fishing—a most important question, dealt with, then repealed, then reimposed—and about local regulations being placed in the hands of the magistrates. Every conceivable thing was regulated. Let us look at the regulations from 1783, passing over all the regulations antecedent to 1783, although they were there. They were in operation. You could not carry on this fishery without regulation, and that is the reason



why I think the Tribunal have heard so much about regulations and know so much about them. That is the reason why I ventured, at the risk of repetition, to begin my argument by reinforcing the necessity for regulation, a necessity which has an important bearing upon every feature of the case. I use it now to show that you could not get on without regulation. With the angry competition of these fishermen for the best place the maintenance of order would be impossible without strict regulations. With the different kinds of implements, by way of traps, and pounds, and purse seines that could be used there, it was essential for the preservation of the fishery that there should be regulations, and there must have been regulations. I turn with interest to find what is the attitude then of Mr. Turner about that. What does he suppose happened after the treaty of 1783 was passed? Does he suppose that the colonies, having the possession of these inshore fisheries, stopped the regulations? Does he suppose that after the treaty was passed the colonies said: Now, we must regulate no more? He cannot suppose such a thing. There must have been regulations—old ones that were continued, new ones that were imposed in order to meet any new difficulties. You cannot expect the new ones to be numerous, because the fisheries were  
 978 old and the laws which had been passed in regard to them had not been found ineffective, but they were now in operation in regard to all the fisheries that the United States took by that treaty.

Again, Mr. Turner said: I do not look at the regulations which touch what I now call the non-treaty coast, because we are here concerned only with the treaty coasts. But there was a fallacy in that. In 1783 all the coasts were treaty coasts, so that the United States, from that period till 1818, or till 1812, was enjoying the right of fishing under that treaty, and in the exercise of that right it was being subjected to local jurisdiction. So that the question of non-treaty coasts has no application in 1783. At that time they were all treaty coasts, and any regulation made with regard to any part of the coast from 1783 to 1812, when war broke out, is notice to the United States that the fishing right that they enjoy under the treaty is a right subject to the local jurisdiction.

The United States assert repeatedly that their liberty in 1818 is a continuance of the liberty which they had enjoyed antecedently. They say, in 1818: We will not have what you are giving to us now put under any conditions different from those under which we enjoyed the old right. They thought they were maintaining a point in their favour. They were certainly obliging me by assisting me in my argument, because that is just what I am contending here. In 1818 they took the new liberty under the same conditions as those under which they had enjoyed the right conferred upon them in

1783, and what was that right? For the purpose of ascertaining that we turn to the regulations affecting the coasts on which they were then fishing, and these are the coasts to which Mr. Turner has declined to turn his attention. Every one of the regulations then made is material, or very many of them are. They affect nearly every one of the subjects that I have mentioned.

THE PRESIDENT: Could you submit to us a list of those regulations before 1783 and from 1783 until 1818, at your pleasure, giving an indication of their contents in two or three words?

SIR W. ROBSON: I shall be very glad to do so. I have here an excellent note which I owe to the industry and ingenuity of my learned friend, Mr. Peterson, and I will have this note<sup>a</sup> handed to Mr. Root and to the Tribunal. It shall be typed as quickly as possible. I may tell you exactly the plan of it. It commences before 1783. It gives the regulations in Newfoundland before 1783, beginning at 1611. Then it gives a short account of each, just exactly such as the President has asked for. It has first of all a reference to the Appendix where the Acts are set out in full, so that the accuracy of the note can be tested. It gives a short account of the material sections within a single line like a marginal note, indicating their contents. The first statute of all is important, and it is dated 1653. That is a long statute with a schedule of laws attached. Then in 1660 are the Star Chamber rules. They were called the Star Chamber rules, because they were rules made by the King in the assumed exercise of his own prerogative in 1660 in the unfortunate days when the King was assuming to act without the assistance of Parliament, and therefore it occurred that they were called the Star Chamber rules. Then there follow the Acts of 1670 and 1699, the latter being the principal Act relating to regulation, referred to in many of the other Acts, and more or less, I think, incorporated with other Acts for facility of reference. That gives all of the Newfoundland statutes before 1783. Then, with reference to Labrador, before 1783, there are regulations by the Governor, acting under the royal authority, and closing that fishery to all except whale fishers. There is a little doubt when one comes to the statute, and it may be that it is open to another construction, but I think it referred only to whale fishers. But it is unimportant because, as we have seen from the extracts that I have read, and as far as the case will enable us to judge, the United States fishermen, in the pursuit of their adventurous calling, never appear to have gone there. Then come the regulations before 1783 in Nova Scotia, New Hampshire, New Plymouth and New York, about which I need not trouble. Then it goes on from 1783 to 1812. Then it gives the regulations in Newfoundland, the first being in 1786, which, I think, has

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<sup>a</sup> Appendix (B), *infra*, p. 1362.



probably escaped Mr. Turner's attention, or he may have thought that it did not apply. It is provided by this Act of 1786 that no person concerned in the fishery shall use any seine or net for catching cod by hauling such seine or net on shore or tucking it into a boat if such seine or net has a mesh of less than 4 inches, and, by section 15, forbids the selling of boats, &c., to any alien. Then there are the

Nova Scotia Act of 1786, and the New Brunswick Act of 1793, 979 going into great detail with reference to minute matters of fishing—the inbarring of herring, the size of nets, &c. This is all in your Appendices; you can get the references there and verify these notes. Then, there is a provision relating to Sunday fishing. Sunday fishing is a matter upon which I venture to lay the very greatest stress. It is not a question merely of the preservation of fish, although there are some who believe that it is necessary to give the fish a Sabbath rest, and from that point of view it is important. But, it is from the point of view of social order that we must attach the greatest importance to this regulation. In the history of this colony the fishing folk have always been rather particular, apparently, about some form of religious observance. In the very earliest regulations touching the conduct of the industry Sunday worship was made compulsory. That, of course, ceased with the more liberal spirit of the times, at least, a spirit which is supposed to be more liberal, but later on, with some variation in the policy of the colony, they felt that the prohibition of Sunday fishing was necessary to them as a limit upon competition. It would be impossible to keep order in such a colony if the views which have been expressed on behalf of the United States with reference to Sunday fishing were allowed free play. The United States fishermen say, and, from the economical point of view, they say with great force: We come a long way; it is a serious thing for us to have our fishing interrupted from Saturday until Monday; not so serious to you, but it is to us, and therefore we claim the right to fish, and we assume, I think not unreasonably, that Sunday fishing would be one of the things upon which the United States might insist. Looking at the matter as one of mere economics, it would be difficult to resist their contention; but looking at the matter as one of social order, and, therefore, one in which local jurisdiction is especially concerned, it is vital that the local fishermen should not be put in the position of having to see their competitors sweeping the waters on their coasts, while they themselves are compelled, for excellent reasons, to remain inactive.

That is a digression. I continue now with my note. Lower Canada, in 1785, had regulations of the same character, as will be seen by reference to the note, and then again in 1786, 1788, and 1807. This note shows each of the material sections. It can be shown down as late as 1812.



Then comes the third division, which, from the British point of view, does not matter. It is after the war of 1812, but still the same regulations are in force. Then we have the regulations in New Brunswick. Of course that would not affect the United States, except under the treaties of 1854 and 1871; but, however, they are all here. So, in the same way, we have the laws of Lower Canada and Newfoundland. There was a very important statute of Newfoundland passed in 1824, to which the attention of the Tribunal has already been drawn specially; questions were asked upon it, I think, both by Sir Charles Fitzpatrick and Mr. Justice Gray. Then there is the Act of 1838, the Act of 1862, and so on; however, that, I consider, is not very material. I am not going to trouble very much over that long controversy which followed upon the treaty, and which has been dealt with with such extraordinary care and skill by my learned friend, Mr. Ewart, because, although it is all-important. I think he has done that part of the work, and I shall not now concern myself with it at all.

But, now, this shows how complete and full the exercise of our jurisdiction was at every material stage and upon every material point. Mr. Turner could not get over that. He does not get over it. He could do much, and he did much; but the facts being all the other way they remain just where they were. In spite of everything counsel could do or say of them, and about them and around them, there they still are, and after Mr. Turner's speech these regulations still remain, and they are not disposed of at all.

They are not obsolete. Why should they become obsolete? They were necessary. If Mr. Turner were going to prove that these statutes were obsolete, nobody knows better than he does the way in which he should set about doing it. If Providence had given him the facts he would say that they had become superfluous; that these regulations had ceased to be applicable; that the people had ignored them; that they had forgotten them. Nothing of the kind is shown. It is only suggested by mere affirmation, not suggested in the evidence or in the argument—not a word to show that they are obsolete. We have laws that are much more ancient than these are in this old Empire of ours, but we do not find them obsolete. We find that the older they are the better they are.

Now, at p. 2732 of the official report of the Argument [p. 449 *supra*] we find the following:—

“JUDGE GRAY: May I ask, Mr. Turner, if during that period they undertook to impose, or did impose, any regulations on fishing by either British subjects or American citizens?

980 “MR. TURNER: They did not turn their attention to the subject of regulations at all, in their relation to either one or the other.”

That, I see, is a later period than 1783. He refers now to 1834, or some such period. Then he goes on:—

“We have the specific statement of the law officers of the colony of Newfoundland that there were no laws or regulations in force in that colony as late as 1855; and to that proposition I read to the Tribunal from the United States Counter-Case Appendix, at page 251. This is all the answer that I think it necessary to make to the very extended reading indulged in by learned counsel on the other side of these very old and very ancient proclamations, directions, and orders in council.”

Mr. Turner treated our evidence on that part of the case as though it had been merely an innocent indulgence on the part of my learned friends, Messrs. Ewart and Peterson, when they had indulged in this very old reading. It was a great labour—I do not say, by any means, one of love—but it is one which has been very complete, and I venture to say is very conclusive. How shall I deal with the statement of Mr. Turner as to the Law Officers of the Crown saying there were no laws or regulations in Newfoundland as late as 1855? That overlooks, as one very easily might, the fact that the Attorney-General of Newfoundland was referring only to local laws. Mr. Turner read himself a little later this passage. The Attorney-General goes on to say:—

“‘In reply to your communication transmitting a copy of a Despatch from the Right Honorable the Secretary of State for the Colonies to His Excellency the Governor, dated the 23rd of August last, requesting him to forward to the British Minister at Washington, authentic copies of all the laws and regulations of the Legislature,’”——

That is the Newfoundland Legislature which was, of course, only called into existence in 1834, and these laws to which I have been referring are antecedent to that date. It is the date antecedent to that which is really material—

“‘or other competent authority of Newfoundland, on the subject of the Fisheries of this Island, we have the honor to report, in compliance with the desire of His Excellency, that, apart from the common law of England, which is in operation here,’”——

I suppose by the common law he meant the statute law—

“‘so far as it is applicable to the circumstances of the Colony, and the several Treaties defining the relative rights of England, France, and the United States of America to the fisheries of this Colony, there are no special enactments of the Local Legislature in operation here for the regulation of the fisheries.’”

Of course, the word “local” might very easily not have been sufficiently observed, but all the substantial regulations in Newfoundland were not local at all, but imperial, and were passed during the period before the Local Legislature was formed.



JUDGE GRAY: What is the date of the report of the Attorney-General?

SIR W. ROBSON: 1855.

THE PRESIDENT: May I ask, were there not perhaps old French regulations which had to do with the regulating of the fisheries in Old Canada, including Cape Breton and New Brunswick?

SIR W. ROBSON: I have no doubt that there would be. I have not searched nor directed any search to be made, but I have no doubt that before 1763 there would be French regulations when France was the governing power in Canada. I have made no such search, but if the President thinks it necessary, we will endeavour to discover.

THE PRESIDENT: It is perhaps not material, but it would be interesting. We will adjourn until 2 o'clock.

[Thereupon, at 12 o'clock, the Tribunal took a recess until 2 o'clock p. m.]

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AFTERNOON SESSION, JULY 25, 1910, 2 P. M.

THE PRESIDENT: Will you kindly continue, Mr. Attorney-General?

THE ATTORNEY-GENERAL, SIR WILLIAM ROBSON: I was dealing with the speech of Mr. Turner in relation to the case put forward by Great Britain on the regulations that had passed. There are very few observations which I need make further upon it. I think I have indicated my case on that head sufficiently. Mr. Turner thought that the only material statutes were those which related to the treaty coasts. Well, by that means he eliminated from his argument a great many regulations which I think I have shown to be very material, and that really makes a sufficient reply to the answer that he gave to our case.

What do these regulations establish? What propositions may I lay down as having been proved up to this point in my argument? Of course, when I say that I have proved them, I mean I am dealing here with the evidence put forward by the learned counsel who preceded me, and endeavouring to give it point and application in some legal proposition. My contention is that on the case as far as it has gone, I submit I have shown that this fishery was always a regulated fishery. That is my first position. Next, that it was always enjoyed as such, so far as it was enjoyed by the United States at all. The citizens of the United States enjoyed it as a regulated fishery when they were British subjects. They enjoyed it as a regulated fishery when they were subjects of an independent State, from 1783 to 1812, and they enjoyed it as a regulated fishery in the later period down to the present time.

So that if these propositions are accepted by the Tribunal, the whole case on antecedent right is not merely gone, but, if it remains, it remains as an argument in my favour. It remains to show that,

judged by antecedent right, judged by the historic test which Mr. Turner said he was going to apply to the construction of this contract, the United States have no ground whatever for saying now that they are to enjoy this fishery as an unregulated fishery.

What is the legal application, then, of these propositions? The United States have suggested as one of their grounds of action—it, again, is rather hesitatingly suggested in their pleadings—that we, by our construction, offend against the admirable principle of law that a man may not derogate from his own grant. Of course, nobody would contest that as a proposition of law. If Great Britain has made any grant, no matter how far it may extend, no matter how it may cut into its own sovereign rights and status, it must stand by its agreement. It cannot make any regulation that will diminish or impair the effect of the rights that it has conferred upon the United States. That is common ground between us both. But it is put forward by the United States as though it were almost to be assumed that we were seeking to derogate from our grant, because they say: You are making regulations which touch not merely matters essential to your local jurisdiction like matters of public order, but you are touching the very time and manner of the exercise by us of the right that you have conferred upon us; and that is a thing you have put beyond your control. That, I think, is fairly stating the case for the United States from that point of view. But everything depends upon what the grant is. Before it can be said that Great Britain is seeking to derogate from its grant, we must ascertain exactly what the grant is. For that purpose, says Mr. Turner—and he says it most rightly—we must look at the historic part of the case. I am glad that, in throwing away the historic part of the case as a ground of action in the technical sense, he did retain it, as he said he would, as an aid to the construction of the treaty, because it aids us in this most material and vital part of our case: What was the measure, the scope of the right which was conferred? For that purpose we may look, and should look, to all the surrounding circumstances. I submit the surrounding circumstances show that the very essence of that grant was subjection to the local jurisdiction. I am going to show it further from the documents. Even without approaching a document, I think that part of my case is established by the evidence put before the Tribunal. You could not carry this fishery on without some regulation at all. The regulations necessary for the fishery were such as necessarily affected, to use the words of the United States Argument, “the very matter of the time and manner.” Unless they went that far, they were of no use at all. You could not do anything with regulations which were partial in their application—regulations by Great Britain which touched only  
 982 British fishermen and left American fishermen at large. That



would be an unregulated fishery, with the additional chances of disorder owing to confusion of law. And, therefore, the grant was not as the United States have assumed, the grant of a sovereign right; it was the grant of what I may call a subordinate right, though that is not a very happy phrase. It is a grant as between States of the character that we are familiar with as between individuals. Every right granted under municipal law is subject to municipal law. And in this particular case the right that they were granted was a right not to be excluded from these fisheries, a right to come as they had come—I here use their own argument on which such stress was laid—a right to come as they had come—subject to the local law. They had never had any greater right. That is the right which, as I shall show from a very few references to the documents—they will be very few, because after all they are very conclusive—that is the right which they knew they were getting, and which they said they were getting. That is a further proposition that I shall show. Anyhow, there is no derogation from the grant. That is, I think, perhaps all I need say, at all events for the present, on that part of the case.

Then negotiations began, and the Tribunal has listened with more than ordinary judicial patience, great as we members of the Bar know judicial patience to be, to the long, but I think always relevant, always material extracts that have been presented upon this subject.

Perhaps, before I go on to the negotiations, I should draw attention now to the Declaration of Independence in 1776, and then the war and the peace in 1783. Now, say the United States—this is a very important step in their argument, one which wants a little examination, and which, I think, on examination turns out to be fallacious—the right which we enjoyed as colonists or subjects we now hold as citizens of an independent State. That is to say, a change takes place in the character of the grantee; but it is a long step to say that, because the grantee has changed his character, it has any effect whatever on the character or scope of the grant. Instead of being a colonist he has become the citizen of a great Republic. But how does that affect his right? He can enjoy as a citizen precisely the right that he has enjoyed as a colonist. There is no necessary implication that the right has altered its character because he has altered his. The right is made permanent. That I agree. There is undoubtedly a distinct enlargement of the right; but that is all. Instead of a liberty enjoyed by a colonist on the shores of another colony, we have a liberty permanently enjoyed by a citizen of an independent State upon the same shores. There is the whole difference. But by what right does the citizen of the independent State say: "This liberty is enlarged, not by express agreement of the parties, but simply because I, the grantee, am enlarged. I have become the citizen of an inde-

pendent republic, and therefore I claim now, what I never had before, what your agreement does not give me, I claim sovereign rights." That is something not at all necessary to the enjoyment of the right as he had hitherto enjoyed it; and yet that fallacious argument, that false step in the reasoning of the United States, is at the very root of their case. It is the foundation of their case on what is called the historic part of the argument; that merely because they acquire full independent political rights they obtain powers of jurisdiction in a foreign State, because they enjoyed a liberty in a foreign State. By what reason do they draw any such inference or put up any such claim? We allow foreign States to come on our territory, we give them many rights, not prædial servitudes, but we give them ordinary rights under our obligations. The mere fact that we have given those rights to the members of a foreign State does not make any difference to their Government. It does not give their Government any rights. It does not enable them to treat those rights as though they were different in character and substance from our own subjects, who enjoy them over the same territory. But that assumption is made by the United States—not proved, not argued out in law—throughout all the argument; and there could be none more learned, none more careful and ingenious than that which Mr. Turner addressed to us; but he never took up that link in his chain of argument, and decided it for our benefit. No reason was shown why, because the States had become independent, therefore they were to have this right in some different measure and in some higher degree than that in which they had previously enjoyed it. In fact, they are now claiming that which certainly they could never have enjoyed as colonists—claiming, in fact, that the other colonists are subordinated to them.

Now I come to another point which I think I shall establish, that the whole argument with which I have dealt up to now, as based upon the circumstances and conduct of the parties, and as being therefore necessary implications in the construction of the contract, really can be established on the documents, the letters themselves. I shall seek to make good, in a few references to evidence, with which the Tribunal is familiar, though it has mostly been quoted upon other points, these two propositions:—

That the United States and Great Britain, in 1818, contracted on the express basis, on the express and agreed basis, that the grant of this liberty should not and did not divide the sovereignty; and then I will show as a further proposition, that, having made the treaty, the parties acted—and this has been so much dealt with that I shall deal with it briefly, but still I must take it up as part of the regular sequence of my argument—both parties acted upon it according to



the view of it for which Great Britain now contends, showing conclusively what their contention was. In other words, when we leave the contract, the strict document of 1818, and go into all the negotiations that preceded it and succeeded it, we find there the strongest possible express language directed not always consciously, but still in fact directed to this very point, showing that both parties were acting on the basis that this liberty should not affect the sovereignty of what is called now the servient State.

The references, as I have said, are very familiar, but they were used mostly on the subject of bays. My learned friend, Sir Robert Finlay, referred to those passages, I think, in another part of the case, and it will be useful that I should just mention them. They are all so familiar to the Tribunal that if I give the references it is only for the sake of note, because I think the words will strike the members of the Tribunal at once as being well known, and that no one will need to look them up again.

It will be remembered that when the negotiations began in 1815, after the Treaty of Ghent, in order that this subject, unfortunately omitted at the Treaty of Ghent because the parties could not come to an agreement, should be removed from serious friction between these two States, Mr. Adams still kept to his favourite point that this was a continuance of the ancient right. I am very glad he did, because it helps us, as I have said, to construe this contract very carefully, and it led him into the use of language not now convenient for the United States case. In his letter to Lord Bathurst he makes clear his own position (British Case Appendix, p. 67); it is his letter of the 25th September, 1815. He says the treaty of 1783 recognised:—

“the right of fishing on . . . . places of common jurisdiction, and . . . . the liberty of fishing and of drying and curing their fish within the exclusive British jurisdiction on the North American coasts,”

Of course it was not present to his mind at this time at all that there might arise any dispute as to whether or not our jurisdiction was exclusive. He was not thinking about that. But mark the language he uses. It gets still stronger later on. He is writing in 1815. He is writing in regard to the continuance of a right which has come under the treaty of 1783. How does he describe it? Does he describe it as a place within which Great Britain and the United States have concurrent jurisdiction or dual control? Not at all. If he thought that that is what he had been enjoying under the old treaty, that is how he would have described his right; but he treats the place in which, for nearly thirty years, or over twenty years, he had been enjoying this right, since 1783, in this way. He says: “We have been enjoying it as a right that is—

Where?

“within the exclusive jurisdiction of Great Britain.”

Now, I say that that is language used very inappropriately, if all that time he had what Mr. Turner says he had, a partial sovereignty. That is not the kind of language which would have come into the mind of a great master of language like Mr. Adams. I need not quote his remarks further, because he proceeds with his old argument, and says that no new grant was intended. He lays immense stress on that—undue stress, I think—that no new grant was intended, “but only the continuance of what we had previously enjoyed;” and enjoyed, as he keeps on saying, “within the exclusive jurisdiction of Great Britain.”

Before I give other instances of the same kind, let me refer to the United States Argument, p. 16, in which it is said what the question is that we have to decide. The words are italicized, on p. 16:—

“The United States submits that the question at issue between the two Governments is as to *what regulation of the freedom of the fishery in the matter of the time and manner of taking fish remains part of British sovereignty over waters within which exclusive*  
984 *sovereignty over the fishery has been parted with by Great Britain by virtue of its grant to the United States of an equal right in the said fishery.*”

Now, therefore, their case here is that exclusive sovereignty has been parted with. That is not Mr. Adams' view. It was not Mr. Adams' view of the treaty of 1783, and it is still less his view of the treaty of 1818.

Let me continue these few extracts. Mr. Bagot writes to Mr. Monroe, and he makes it perfectly clear. He says, on p. 77 of the British Case Appendix, at the beginning of the letter, writing to Mr. Monroe, the United States Secretary of State:—

“In the conversation which I had with you a few days ago, upon the subject of the negotiation into which the British Government is willing to enter, for the purpose of affording to the citizens of the United States such accommodation for their fishery, within the British jurisdiction, as may be consistent with the proper administration of His Majesty's dominions,”

That is the only passage I need refer to. Then he says later on, in the second paragraph from the bottom, about the fourth line down from the top of the paragraph, that this accommodation is—

“the privilege of having an adequate accommodation, both in point of harbours and drying ground, on the unsettled coasts within the British sovereignty,”

Then he says, on p. 78, in the first paragraph on the top of that page:—

“The advantages of this portion of coast are accurately known to the British Government; and, in consenting to assign it to the uses



of the American fishermen, it was certainly conceived that an accommodation was afforded as ample as it was possible to concede, without abandoning that control within the entire of His Majesty's own harbours and coasts which the essential interests of His Majesty's dominions required."

So now we have both the parties of this contract, both using the same language; and what is important in this case, where we have so many documents which are never communicated to the others, they are both using this same language to each other. And they are both treating the jurisdiction of Great Britain as exclusive. Nobody dreams of saying: "We are not merely getting your fish, but we are getting your sovereignty."

Then the same language is used in a formal offer by the United States plenipotentiaries. It appears in the United States Case Appendix, p. 253. It is the well-known clause that they put forward, and is in one of the negotiations on the 30th November, 1814:—

"The inhabitants of the United States shall continue to enjoy the liberty to take, dry, and cure fish in places within the exclusive jurisdiction of Great Britain, as secured by the former treaty of peace; and the navigation of the river Mississippi within the exclusive jurisdiction of the United States shall remain free and open to the subjects of Great Britain."

There are the very words used by the negotiators and by the United States in the most formal, international way, saying, "the right which we have heretofore enjoyed was a right within your exclusive jurisdiction. And we propose to continue it." They were always insisting upon that: "It is to be continued as a right within your exclusive jurisdiction."

Then, in the British Case Appendix, p. 74, it is put a little more explicitly, where it is said there, in the latter half of the page, just about a third of the way up from the bottom of the page:—

"The intention was, that the people of the United States should continue to enjoy all the benefits of the fisheries which they had enjoyed theretofore, and, with the exception of drying and curing fish on the Island of Newfoundland, all that *British* subjects should enjoy thereafter."

So that here they are saying: "Your jurisdiction is to continue exclusive. It has always been exclusive. We are only asking to enjoy that which your subjects enjoy." So that I may now put my case, as the Tribunal will see, higher than any mere argument founded on implication. I say that here is language which is expressed between the parties, and which shows that both of them were contracting on a basis that explicitly excluded the contention which is raised here to-day. Up to now I have been saying that such a contention could not be raised by the United States, because they had not shown an adequate legal ground for implying such a term in the

contract. I am now showing that they could not raise such a  
985 contention, because when the contemporaneous correspondence  
is read, they themselves excluded the possibility of such a con-  
tention being accepted.

I go just a step farther, for I am cutting these references short. There came afterwards a dispute with which the Tribunal is familiar, between Great Britain and the United States, in relation to the American rights on the French shore. All those documents have been gone through with regard to bays, and they have a great bearing on this Question too. Who was conducting those negotiations? It is very useful to observe that they were negotiations conducted by the same persons, who had changed their capacity a little; I think Mr. Adams was in some higher capacity than that which he had previously occupied,—he was Secretary of State; but the same persons who had made the treaty of 1818 were conducting this very important international dispute in relation to their use of the French shore in 1822. Mr. Gallatin and Mr. Rush were the signatories to the treaty of 1818. Mr. Adams also played, in that treaty, an important part. So that you have the persons who had drafted the treaty, who had used its language, who were the best of all judges as to its true intent, from their point of view. These are the very persons who, within a short time after that treaty, are writing these letters; and now mark the language they use. It is language which puts this point really beyond any doubt at all. France, of course, had a very strong case for partition of sovereignty, if such a case could ever be established at all. It had been sovereign, undisputed sovereign of the Island of Newfoundland—at least never undisputed sovereign—I do not believe there was any part of the French or English dominions of those times that was not disputed by the other; but at all events it had been owner and lord of Newfoundland. They had reserved as a right to themselves upon the western coast a right of fishing which was, according to their contention, one to be exercised alone; so that, if anybody had a good right for partition of sovereignty, it would be the French. Now when the Americans came and claimed the right to fish on that shore by virtue of our grant, the French said: “No.” And the reply of these gentlemen who had made the treaty of 1818 was: “But you have no right to exclude us. You undoubtedly have a right to fish here. We do not think it is exclusive, but at all events there is nothing to show that you have got any share in the sovereignty of Great Britain. Great Britain has not granted you any share of her legislative or executive power.” In fact, Mr. Gallatin, Mr. Rush, and Mr. Adams took up the argument which I am now humbly endeavouring to present, and they used it, I am afraid more concisely than I am able to use it, but at all events certainly not less clearly. They said: “There can be no grant of sovereignty, except



by express terms. There are no such terms in the grant to you, the French people, of the right to fish on this coast. Great Britain remains"—and here I am using the words of the parties themselves—"sole sovereign. Her sovereignty is undivided. The waters of the western coast of Newfoundland are purely British waters." That is what they said. I need not read all of these passages. They are so familiar to the Tribunal that I do not need to go through the references again. But I wish to recall the fact that Mr. Rush writes to Mr. Gallatin formulating the argument that they were to use in the negotiations, and saying that England had never yielded any exclusive right; and he says that whenever an exclusive right is granted, proper words are used for that purpose; and winds up by quoting with approval from a British document:—

"Your Majesty continues to be sole sovereign of the Island of Newfoundland." [British Case Appendix, p. 102.]

The reply of France was that the United States had acknowledged her claim to exclusive rights by the treaty of 1778; and I think France was right. I am not concerned with the merits of that controversy, but when the revolution was in progress, and the war between England and the United States was at its height, America, needing the assistance of France, had undoubtedly agreed to acknowledge the exclusiveness of the French right by the treaty of 1778; but that was a terminable treaty, and it was determined by the United States, and the United States contended, I think not very logically, that as it was a terminable treaty, and its existence had been brought to an end, the recognition of exclusive right on the part of the French had died with it; so that the Americans were no longer bound by the admission they had made in 1778. So they continued the argument, and this is how the United States replied to it. I think it is worth my reading the exact words, because they are important. It is on p. 105 of the British Case Appendix, where they state this point in terms of extraordinary clearness. They say:—

"Whatever may be the extent of the rights of France on that coast, whether exclusive or not, they are only those of taking and  
986 drying fish. The sovereignty of the Island of Newfoundland, on which she had till then possessions, was expressly ceded by the treaty of Utrecht to Great Britain, subject to no other reservation whatever but that of fishing as above mentioned, on part of the coast."

Now, these are the material words:—

"The jurisdiction and all the other rights of sovereignty remained with and belonged to Great Britain and not to France. She has not therefore that of doing herself on that coast, what may be termed summary justice, by seizing or driving away vessels of another nation, even if these should in her opinion infringe her rights."

That is signed by Mr. Gallatin, who was one of the signatories to the treaty of 1818. Could my point be better put than it is put there? The jurisdiction—all I am contending for—remained with Great Britain. Although the French liberty was of a character so much more extensive and explicit in its terms than the liberty given to the United States, still, says Mr. Gallatin, it does not touch jurisdiction. Then he explains what he means by jurisdiction. He says France cannot herself do summary justice. But that is what Mr. Turner wants for the United States. Mr. Turner says: "We claim not only an equal voice, we claim by our own hand to enforce our rights." And Mr. Turner went no further than the necessities of his argument compelled him to go; because you cannot trifle with sovereignty. If you once give anything in the nature of a sovereign legislative power to a state, you cannot stop there. If you are doing it by implication, the same implication that induces you to give anything compels you by logical necessity to give all. It would be absurd for Mr. Turner to have argued—he did not, of course, but it would have been absurd for him to have argued—that the United States got some right of recommendation, or of being consulted, or any such modified right of that kind. It would be no use. And if he felt that if the implication which he was seeking to establish was to be established at all, it must go the full length. It must be real sovereignty, with all the incidents of sovereignty, and among others that of enforcing their rights on a foreign soil by hostile action against the citizens of a foreign State in time of peace. That is the contention to which he was driven. The framer and signatory of the treaty tells this Tribunal, as clearly as he can use words, that that is not what he meant in 1818, because he was taking, then, a far less right than the French enjoyed; and he said even with regard to that greater right, the ordinary principles which govern nations in their contracts apply, and you are not to imply, as part of the contract, that which it cannot be reasonably supposed the parties intended to give. Mr. Gallatin was a good enough lawyer to know that he could not make a contract for the parties, and he told France: "If you wanted an exclusive jurisdiction, you should have had it put in. You should have had the word 'exclusive' used. You have no right to get by implication that which you might have got by explicit terms."

That was the attitude, the just and fair attitude of the framers of that treaty themselves. Then, later on, there are other passages that I need not trouble about. Again, there is the repetition of the words "exclusive jurisdiction." And they claimed the protection of Great Britain. They say: "France has no jurisdiction; none at all." And they claim the protection of Great Britain. Why? Because they say: "We have this grant at your hands, and it is for you



to make it good." There is no suggestion here that they had an original sovereignty, or that they had any higher right, independent of grant. That never entered their heads, because they said: "Like every other grantor, if you purport to have given something which you did not possess you must provide compensation. If the grantee is disappointed in what you had led him to think he was going to get, you must provide compensation." And they claimed compensation from Great Britain—clearly asserting not an original sovereignty, but a limited liberty, subject to a local law. If they had had an original sovereignty they would have said: "We do not trouble about Great Britain. We are here; we are entitled to go to these waters and enforce our rights against Great Britain if need be, but certainly against France." They would have said it, and I think those heroes of the Revolution would probably have done it, if they had thought they had a good cause, because they were courageous, and a combative race—like the race from which they sprang.

Just another quotation, which is almost a page further on, p. 108, and a very useful one to bear in mind. Mr. Adams, in his letter to Mr. Rush, towards the end of the first long paragraph, says:—

"The deliberate pretension to exercise force within purely British waters was unexpected on the part of France."

987 I do not need to go into the historic incidents with which this incident was connected. I am simply drawing attention to the manner in which he describes our waters which are subject to the French liberty. He says they are "purely British." And now I wish to refer to a most significant phrase, which sums up the whole of the case on this point, used by Mr. Rush. I read from p. 110 of the British Case Appendix, a sentence or two down from the beginning of the third paragraph:—

"That it can never be presumed that she intended so far to renounce, or in any wise to diminish this sovereignty as to exclude her own subjects from any part of the coast. That no positive grant to this effect is to be found in the treaty, and that the claim of France to an exclusive right, a claim so repugnant to the sovereign rights of Great Britain, can rest on nothing less strong than a positive grant."

It is in the paragraph after that that the words occur on which I lay such stress. It is in the second sentence:—

"It is obvious that if Great Britain cannot make good the title which the United States hold under her to *take* fish on the western coast of Newfoundland, it will rest with her to indemnify them for the loss."

Those words: "under her" are words of the first importance in such a controversy as this. They dispose, really, of both branches of the United States argument. They dispose of the historic branch, if that

needed any further refutation, that the power was original and inherited, and wanted no grant to enforce it; and they dispose also of the suggestion that the grant, when made, was co-equal and co-sovereign, and carried with it jurisdictional power.

Really I cannot put my case stronger than it is given me there, in one significant word by Mr. Rush, a signatory of the treaty. If Mr. Rush were here and gave as evidence just that single sentence, if he said the intention of the parties to that treaty was that this should be a liberty held by the United States "under" England—"within her jurisdiction" is the phrase used again and again, and "under her law"—I could not put our case more strongly. And he goes on to speak in other passages of the same character—I do not need to trouble about them—where he says this liberty was held at the hands of Great Britain, and so on. Again I pause—

JUDGE GRAY: I do not quite understand, Mr. Attorney-General, the significance of that phrase as you seem to put it. I hope I am not interrupting you?

SIR W. ROBSON: Not at all, Sir. I am much obliged for any questions.

JUDGE GRAY: The words you read are:—

"It is obvious that if Great Britain cannot make good the title which the United States hold under her to *take fish*" &c.

Do you mean that those words "under her" are to be taken as recognising a situation in which the right to fish is taken subject to a sovereign right to regulate?

SIR W. ROBSON: I think, Sir, with the other expressions that I have indicated, that that is the sense in which Mr. Rush is using that language.

JUDGE GRAY: Is there not another sense in which it could be taken? Cannot the words:—

"cannot make good the title which the United States hold under her to *take fish*"

be applied to make the step in an ordinary devolution of title? A grantee takes "under" his grantor in that sense. It does not mean that he takes under any reserved rights of the grantor.

SIR W. ROBSON: It might, I dare say, be limited to title, in a sense which would not necessarily carry with it jurisdiction, which, I think, is the point that Mr. Justice Gray is putting to me. I think it might be limited in that way; but I am taking it as the concluding sentence of a correspondence in which one takes the meaning of each word in reference to the other passages in the correspondence, where you are getting references to exclusive jurisdiction, and you also have the observation made again and again that the right is to be exercised within that jurisdiction.



SIR CHARLES FITZPATRICK: Exactly; and in the very next sentence.

988 SIR W. ROBSON: Yes; I am much obliged:—

“Another question which it is supposed will also be for her consideration is, how far she will consider it just or proper that France should be allowed to drive or order away vessels of the United States from a coast which is clearly within the jurisdiction and sovereignty of Great Britain.”

That sentence helps to attach my meaning to the words “under her.” I am rather disposed to agree with Mr. Justice Gray that if the words are quite isolated from the other passages, and from the immediate context, they are open to the observation that they might have that more limited application. But when one comes to them as part of a correspondence showing this language, then I think I am justified in saying that it shows the general sense in which the framers of the treaty were themselves construing it. It was a title derived from Great Britain, not from antecedent ownership; and it was a right which was held under Great Britain, because the representatives of the United States were insisting upon it as being within her jurisdiction; and because it was within her jurisdiction they claimed from her compensation in case the title was not made good.

I do not wish to lay too much stress on any word. It may be that I am laying a stress on the word “under” there which it would not of itself carry. I do not mean to do so. But when one looks at the correspondence as a whole, can there be any doubt about it that these gentlemen who framed the treaty of 1818 thought that the effect of such a document was to leave sovereignty intact?

THE PRESIDENT: Is not the question, Mr. Attorney-General, whether the words “under her” signify only derivation of title, or whether they imply also some sort of subordination?

SIR W. ROBSON: Yes.

THE PRESIDENT: The meaning attributed to them by Mr. Justice Gray is more of a derivation of title; and is there not in the next following sentence, in the postscriptum of Mr. Rush, something which could be interpreted in the sense of a derivation of title? Because he speaks there of the “eviction” of the United States by France. And this term “eviction” is used in cases of eviction from property, in consequence of default of title of the previous owner. Is not that something which tends to support the interpretation of Mr. Justice Gray?

SIR W. ROBSON: One recognises that the other construction is possible, but it struck me, and I think strikes me still, as involving subordination. The other interpretation may be arguable, but I think what it really means is: “We are asking compensation.” Why? Because we are under you. You are our sovereign, to whom

we look for our rights, and if you do not make good those rights, then we think you must make some compensation for their loss. I think it is the very subordination of the American position which they are pleading against their own sovereign: "We are in your jurisdiction. Being in your jurisdiction, you must make your jurisdiction good." Still, as I say, I do not wish to lay too much stress upon a single passage where, after all, one is not deciding this argument upon meticulous phrases. I am endeavouring to put my argument so that the language may be dealt with as a whole; and I think, as a whole, there can be no doubt that the United States were then taking exactly the position that I have indicated.

SIR CHARLES FITZPATRICK: Does not the very use of the word "eviction" imply that?

SIR W. ROBSON: Yes.

SIR CHARLES FITZPATRICK: Would a Sovereign be evicted from its territory?

SIR W. ROBSON: That strengthens my argument, of course.

SIR CHARLES FITZPATRICK: Would it be conceivable that a sovereign Power would claim that it was being evicted, and appeal to another Power to protect it from eviction?

SIR W. ROBSON: That, I think, would be a very strong point in favour of the construction for which I am contending. But I do not want to take up too much time in the construing of a particular phrase. One wants to look at the thing broadly because that was not part of the contract; that was not used as a part of the contract. I am only using it as indicative of a state of mind; that is all.

Now, to sum up the position that the United States took in relation to that liberty, and compare it with my own position now. The United States contended then that the jurisdiction and sovereignty of Great Britain remained sole and undivided. "Sole sovereignty" is its own language. The United States contended that the jurisdiction, and all other rights of sovereignty, every one, remained with and belonged to Great Britain and not to France; that France had no right of doing herself summary justice; and that she had no jurisdiction whatever, but only a liberty. And that is my position to-day. And it excludes absolutely the construction that the United States seek to put upon the contract.

All this time, as the Tribunal will bear in mind, we were going on regulating the fishery, and the United States was accepting that position.

It is scarcely necessary, but I will read here just one passage from Oppenheim, upon this question of interpretation, in order that I may not appear to be submitting these facts as merely my own ideas, but to fortify myself with the name of some authority; though, in truth,



I do not think any authority is needed by the Tribunal for such a proposition.

Oppenheim says, at p. 559:—

“it must be emphasized that interpretation of treaties is in the first instance a matter of consent between the contracting parties. If they choose a certain interpretation, no other has any basis. It is only when they disagree that an interpretation based on scientific grounds can ask a hearing; and these scientific grounds can be no other than those provided by jurisprudence.”

I read that because it is not quite the same as most municipal laws. I have very little knowledge of the laws of any country except my own, but I can well imagine that municipal law might provide that the construction of a contract was to turn simply upon the language of the contract itself; that you would not be at liberty, as of course in English law you would not be at liberty, to look at all these letters and this correspondence. They would all be completely and absolutely excluded, and we should have to try to derive what knowledge we could of the intention of the parties (which is the aim of all construction) from the contract itself, together with any custom which might be supposed to form the basis of the contract. But Oppenheim lays down as a rule in international law, and it seems an extremely good rule, that after all, international tribunals, in dealing with such documents, must first consider: How have the parties interpreted the contract? Because a great Tribunal like this is free, as I have already said, from many of the technical rules that hamper judicial bodies under national laws; and that certainly is an equitable and sound rule. No matter what the contract says, under a technical construction if the parties have agreed and themselves stated what it is to be taken to mean, that is to be its meaning. Now, here you have this contract construed by the very men that made it. That is why I attach so much more importance to this date and this period than I do to all the admissions that were made later, and which Mr. Ewart dealt with so fully and so ably.

I am quite certain that when the records of diplomacy come to be considered in connection with this case they may be very contradictory, because Great Britain, like other countries, with many relations in different parts of the world, is apt, sometimes, to take different views according to different departments, and the different departments take different views according to different changes of circumstances. You do not get very much consistency in the diplomacy of a great Empire. So that, as far as admissions are concerned, they are useful, but they are much less important than that which amounts, in the words of Oppenheim, to a construction put by the parties on their own documents. And, Mr. Gallatin, Mr. Rush, and Mr. Adams, the three persons who made the treaty under consideration, are also

the three persons who conducted this correspondence with France, and who there laid down every one of the propositions in relation to this very coast for which I am now humbly contending.

That brings me to the words of the treaty itself, and I feel almost inclined to apologise for having detained the Tribunal so long over what, after all, is not the treaty itself, but simply a matter bearing upon and explaining the treaty.

SIR CHARLES FITZPATRICK: Where did that controversy arise? In what particular portion of the coast of Newfoundland were the American vessels when they were ordered away?

990 SIR W. ROBSON: In the bays. I think in the three bays: St. George's Bay, the Bay of Islands, and Port-au-Port. That becomes material in another question. Question No. 5.

SIR CHARLES FITZPATRICK: I beg your pardon.

SIR W. ROBSON: American vessels were fishing in those three bays, and the French ordered them out, so that it is worth remembering this in relation to the later point, they claimed the right to fish in the bays which now they are saying are open sea. They never said then to France, you have no right to turn us out of these bays, because these bays are open sea. We do not depend upon Great Britain for our grant here. They might have said that. They did not. However, that is germane to a later question.

I come now to the words of the treaty, and here, in my humble submission (and I say it needs some justification for offering it) all this argument is really made superfluous by the plain English words that are used in this treaty.

I submit to the Tribunal that the framers of the Treaty used the most appropriate words they could find in the language, expressly to subject the inhabitants of the United States to the sovereign jurisdiction of Great Britain in relation to Newfoundland and this right. The words they used were, first of all, in reference to the inhabitants: That they should have the liberty in common with British subjects. Each word of the treaty is consistent with each other word of the treaty, in order to express and enforce the construction for which I am contending.

First of all it is a "liberty." If they had wanted to convey a portion of sovereignty, they could not find a word so inappropriate as the word "liberty." There was, as the Tribunal will remember, a great dispute as to when they should use the word "right" and when they should use the word "liberty." I am not going to trouble the Tribunal with references to it, because you are all so familiar with the way in which that dispute keeps turning up again and again in the different letters, but, it is a dispute which has a very important and useful bearing upon this argument.



Mr. Adams said the word "right" is properly used with regard to the fishing in the high seas. Great Britain had been claiming jurisdiction over the high seas. It is a claim which I am glad to say was dropped when we come to the treaty of 1818. But she had been claiming the dominion, not only over this, that, or the other sea, but over all seas.

I need not justify the conduct of Great Britain now, because the Tribunal well knows the great struggle in which she was then engaged, a struggle which has been described by an American historian of genius, Captain Mahan, as the battle between the land and the sea. Napoleon had said he would conquer the sea by the land, and he issued the decree forbidding any English ship to touch at any European port. Pitt had answered by the Orders-in-Council forbidding any neutral ship to touch at any European port until it had first discharged some part of its cargo at a British port. Of course, as things go now, it was a hopeless pretension, and brought about a great war, the war of 1812 most unfortunately; it was a contention that could not be maintained. But, still, now that one hundred years or so have elapsed, one is not inclined to weigh very much in that titanic struggle between these two great Powers of France and Great Britain. It was a question of who was to have dominion of the sea. America, then a young Power, and not, of course, a great naval Power, found herself crushed in the conflict—I will not say crushed, but attacked and injured in the conflict between these two Powers, each fighting for what it believed to be essential to its existence. France fighting for Empire; England fighting, as she believed, for existence, because there is no doubt whatever that if we had for one day lost the command of the sea in the great Napoleonic wars, we would have lost our liberty as a nation, and the British Empire would have ceased to exist.

Under those circumstances one must not look very critically or censoriously at the unfortunate acts, and sometimes the ill-judged acts, to which an English Government, fighting for its life, was driven, and it asserted immense pretensions, no doubt, over the high seas, pretensions to which America very justifiably and very properly refused assent.

Well, it made, however, a step in advance, a useful step in advance, in 1783, when it acknowledged the right of the United States to fish in the high seas; and, there it was treated as a right, and as a "right" only. It said the people of the United States shall continue to enjoy unmolested the "right" to take fish of every kind on the Grand Banks, and all other banks of Newfoundland, 991 also in the Gulf of St. Lawrence, and at all other places in the sea (that meant in the high sea) where the inhabitants of both countries used at any time heretofore to fish.

There is a very important historic event in the history of maritime dominion, that England admits as against an independent nation that she has no right whatever to exercise jurisdiction in the high seas, which meant, of course, off these banks here which are off the Island of Newfoundland.

Now, that was what Mr. Adams was strenuously contending for. It was in reference to that right we had all the eloquent and justifiable language used by the American negotiators during that period. Their language has been continuously applied to these rights which are in question before this Tribunal. Why, these rights were a trifle. There was nothing in them. They scarcely used them. They did not trouble about them. These were a very, very small thing indeed as compared with what America was really fighting for, what she won, to the benefit of mankind, the right to have treated as a part of international law the privilege of fishing in the high sea off the coasts of that continent.

Great distinction was made between the "right" and the "liberty." The word "liberty" was carefully selected. Mr. Adams himself points out in a letter, which I daresay we all remember, the "common right" which is not to be interfered with by any special jurisdiction, and then he speaks of a "liberty" as referring to a special jurisdiction. When we are dealing with rights on the high seas, there we do acknowledge their rights; we do not grant them.

In 1783 it was agreed that the United States should continue to enjoy unmolested its "right" on the banks. There was no grant of a right to fish on the banks.

But now, instead of a right, when we come to the inshore fisheries, then we come to words which are words of grant, "that the inhabitants of the United States shall have liberty" (those are words of grant) "to take fish" within 3 miles.

I say that the use of the word "liberty" shows that an exercise of jurisdiction was intended, and not a transfer of jurisdiction.

If it had been desired to transfer jurisdiction, nothing was easier than to find appropriate words for that purpose. What would the words be? They would not have been a grant of a liberty to inhabitants or persons. They would have been a grant of a share in the fisheries to a Government. If England had wanted to make the United States Government its partner, so as to confer on it the rights of jurisdiction which it is seeking here to do, it was quite an easy thing to do. Words appropriate for that purpose would have come to the minds of every one of these negotiators of that treaty without the least difficulty. They would have said that the United States shall henceforth share with Great Britain the ownership and dominion of that fishery, for that is the way the United States now want to read the treaty. Their statesmen would have had no difficulty whatever in



making it read like that, if that is what they intended. So that the use of the word "liberty" is the first indication that there is here to be no transfer of sovereign power.

Well now, Mr. Turner makes a very good fight over this word. First of all he has to get rid of the word. And so, in order to get rid of the word, he gets what he says is a synonym, and then having got the other word, which is the exact equivalent of that which he has disposed of, he proceeds to read into the substituted word the meaning which does not belong to the other. "Liberty," he says, is a franchise, and now what is a franchise? and thereupon proceeds to give to "franchise" the meaning which he would not dare to ascribe to the word "liberty." But, I would ask also: What is a franchise?

It would be most inappropriate to speak of conferring a franchise upon all the inhabitants of a country. A franchise is a privilege granted to particular persons, giving them some benefit over and above the benefit common to other subjects under the same law. A franchise is a special privilege, of course a phrase perfectly well understood in municipal law in England, in private law, but one never heard of the word "franchise" being used in reference to a whole community, that is to say, to every person in it.

However, what does "liberty" mean? It means simply permission. I am here quoting from Webster's Dictionary. "Permission or leave, as liberty granted to a child to play, or to a witness to leave the Court."

And then, again, in the "New Century," "Permission granted as by a superior to do something that one might not otherwise do."

Well, I think, perhaps it is sufficient to say that a liberty is the exercise of a power by a superior authority giving some advantage or benefit to another person. It is an exercise of jurisdiction, and it is a word wholly inappropriate to convey the idea of a transfer or conveyance of jurisdiction.

992 I think, after all, the word "liberty" is quite understood to mean something less than such a grant as the United States seek now to make it.

Well, to whom is it given? That is the next step. And every word of the treaty here makes a barrier to the United States, every word. The word "liberty" makes one barrier in its way. The phrase "inhabitants of the United States" also makes an insuperable difficulty.

Why is the liberty given to the inhabitants of the United States? Because it is to be held in common with British subjects, that is to say, to be under British jurisdiction.

The Government of the United States could not accept such a liberty. A Government, or a corporate body, can accept nothing except some share in the ownership. That is all it can accept. And,

therefore, in this particular case, the framers of the treaty, who seem to have understood their law better than many framers of treaties, adopted a form which is only appropriate where you are dealing with individuals, subject to some sovereign or common law. They did not adopt the form which would be essential to establish the right of the United States, namely, a grant to the Government itself. If they had intended to give the Government anything they would have not merely made an agreement with the United States, but they would have said: You are to have a share in the fisheries.

Mr. Turner argued throughout as if the fact that the United States had entered into the agreement made the United States Government a beneficiary under the agreement. Not at all. The United States entered into the agreement in order to secure a benefit for its individual citizens, or a particular class of them. That is why. And, if the United States Government had wanted a benefit for itself it would not have only made itself a party to the treaty, which it did, but it would have made itself the grantee under the treaty. It would not have talked of a "liberty" for its citizens to fish. It would have demanded a right for the Government to own a share in the fishery, in such degree and in such manner as that it might give that "liberty" to its own citizens by virtue of its own sovereign authority or ownership.

So that the whole form of the treaty rebuts and excludes the contention of the United States.

Of course, as I need scarcely say, it is not a mere matter of form. That form is vital. There you have got a right given and expressed in proper words. The United States want some other right which is not expressed at all, and in order to do what they have to do to this unfortunate treaty, they have to read right out the word "liberty;" they have also got to read out the words "inhabitants of the United States;" they have to read out the word "liberty" and insert "franchise," or "ownership;" and then they have to delete the words "inhabitants of the United States" and insert "the Government of the United States;" and then they have to strike out altogether the words "in common with British subjects." They were introduced apparently as a mere gaiety of expression. No meaning apparently is attached to them by the United States at all.

Now, they are vital words. They are *the* vital words. They are the words which are used in their popular and ordinary signification, and they are conclusive. "In common" means "upon the same terms as," subject to the same jurisdiction. After these years of controversy I defy anyone to use language which on the whole shall express better the contention of Great Britain than the words actually used. You could not get better words.



The words "in common" make great difficulty for the United States. They have shown some doubt and hesitation in their printed Argument as to how they should deal with them. They feel they must give some meaning to those words. So they say they were used there in order to exclude any contention on the part of the United States that Great Britain was not to share in the fishery.

Now, really let us look at the words. We grant them a "liberty" such as we had granted in 1783. They have "liberty" to take fish of every kind on the coast of Newfoundland, and so on. They have been doing that for all these years. Had it ever occurred to them to say that the liberty thus conferred upon them was exclusive? Had it ever occurred to any British statesman that they might say so? But, says Mr. Turner, the French were saying so. The French were saying so upon different ground. They got those words, so long the subject of conflict between England and France, that we were not to interrupt by our competition, which meant that we were not to go there while they were fishing. We could only go there when they were not there. That made a very fair ground for a claim to exclusiveness. But, the mere liberty to them to go and fish could not have been construed as a liberty to go and fish, and to keep us away.

993 All that this treaty did was to say that they should not be excluded, that they could come on the same terms as our own public. That is the whole of that treaty. That is all the "right" which is expressed by those words. And, to treat those vital words, or at all events those useful words, because I daresay the same meaning would attach to the clause even if the words were not there—treat them as having been inserted simply to show that England retained also the same liberty is I must say to belittle the effect of words in a treaty in a way which is scarcely in accordance with proper canons of construction. The words are there for a sound purpose. What are they there for? They have a very useful purpose.

Supposing they had not been there, supposing we had granted the liberty to fish and had retained, as we did retain, sovereignty over the fishermen, we should have had to make regulations. Now, those regulations would have had to be reasonable regulations, because that is implied. Wherever there is a right retained or stipulated for to make regulations, they must be reasonable.

But, the question of reasonableness is a very difficult thing, and it is extremely difficult in cases as between nations, where there is no supreme sanction, where there is no high international court—and so, when nations have got to settle those difficulties between themselves as sovereign States, it is well that every treaty should rely as little as possible upon mere reasonableness, and endeavour to give to "reasonableness" some definite measure of standing.

Now, that is what these words do.

Supposing we had made some regulation, the reasonableness of which was contested, and in the absence of a Tribunal such as we have the good fortune now to possess, our answer would have been, after all, this regulation which you complain of as unreasonable is one which applies to our own subjects too, so you need not be afraid, you need not be afraid that we shall impose unjust or unfair regulations and burdens upon them, so we will put in these words which protect us both, and they put in the words "in common with British subjects" which, first of all, affirm British jurisdiction, and secondly, supply a measure or test of reasonableness. They are for the protection of both parties. They prevent our being able, if we happen to be the stronger Power, as we were then (I should not like to say any Power is stronger than the United States now)—it prevented any prospect of friction or conflict, because there was an easy test, as to whether our regulations were reasonable or not, and the words are put in with that view, and put in certainly with that effect.

The suggestion that they were put in because we were afraid that having given this liberty, the then United States of America would turn around and say: You shall not fish at all on the coasts of your own islands, you, the greatest naval power in the world in the year 1818, is an impossible supposition.

Mr. Turner drew attention very pleasantly to our condition in 1783, and read a speech from Lord Shelburne, in which Lord Shelburne spoke of sleepless nights, spoke of the condition of the British Empire in that year, and intimated, that after all, England had to take what it could get in 1783.

Well, there is this to be said for England even then. We were not very far from the beginning of the greatest conflict of modern times, 1792, when England stood for more than a decade, right up to 1815, engaged in continual and colossal war. Her resources, even in 1783, were not quite so depleted as Mr. Turner seemed to think they were. Anyhow, we seem to have been in a condition to do a good deal between that date and Waterloo.

But in 1818 what was our condition, and at the end of that war?

This titanic battle between the land and the sea had come to an end, and it had come to an end in favour of the maritime Power. There was no Power in the world so well situated for a conflict, if conflict were needed, as Great Britain. The conflict was not needed, and not desired. Great Britain desired to make a reasonable treaty, it had no pugnacious desire. The British lion, to which Mr. Turner referred, is, in my humble view of him, a peaceful, domestic animal, and has always been endeavouring to live as such when he was let alone; certainly, in 1818 he was endeavouring to make peace which should be a basis of permanent conciliation between Great Britain



and the colonies which she had unfortunately lost. Therefore, Great Britain tried to grant a right on reasonable terms, but it certainly was not conceivable that the United States would turn around immediately afterwards and say: "the liberty that you have given us is one that you shall not exercise yourselves." It is incredible that the words should have been inserted in order to prevent the happening of any such contingency as that. The words must be taken as they stand and construed according to their ordinary and common meaning, and, taken with their context, can there be any doubt that

it is a liberty granted to individuals to be enjoyed in common  
994 with other individuals? You cannot get a form of grant which more carefully excludes the possibility of the transfer of sovereignty than these words, and they are the words of the treaty.

Lét us take a few instances of the occasions on which the words were used. They were used in the treaty of 1854. I am not going to refer to that treaty, because we are all familiar with the words of it. They were used afterwards in the treaty of 1871. In 1854 we know how they were construed by the parties who used them. I think I am right in saying that Mr. Marcy was the signatory of the treaty of 1854, so that Mr. Marcy, who used these words, "liberty to fish in common with British subjects," was the gentleman who issued the circular in which he accepted, as we contend, the meaning we put upon these words.

Again, by lucky chance, we have, on the American side, the framers of their own treaties giving us, in their contemporaneous or subsequent correspondence, explicitly the meaning that they attached to these words, and it is always the meaning which we are attaching to them now. In 1871 the words were used again, and they were used then after there had been a little controversy terminated by the Marcy circular, and they were used also after there had been the correspondence of Mr. Cardwell, in which he had pointed out the view of Great Britain with regard to these words, or in regard to the treaty containing these words. That was in 1866. There was a little controversy, p. 221 of the British Case Appendix. Mr. Cardwell wrote then, at the last paragraph on the page, referring to the determination of the treaty of 1854, and warning all persons concerned that the law henceforth applicable to those fisheries would be that of the original treaty of 1818, and not that of the lapsed treaty, and so, he says:—

"On the other hand, naval officers should be aware that Americans who exercise their right of fishing in Colonial waters in common with subjects of Her Majesty, are also bound, in common with those subjects, to obey the law of the country, including such Colonial laws as have been passed to ensure the peaceable and profitable enjoyment of the fisheries by all persons entitled thereto."

That is sent by the Secretary of State for the Colonies to the Lords of the Admiralty. And in 1870, (United States Case Appendix, p. 597) Mr. Edward Thornton, for England, sends this letter to Mr. Fish, United States Secretary of State:—

“Sir: In compliance with instructions which I have received from the Earl of Clarendon, I have the honor to transmit for your information copy of a letter addressed by the Admiralty to the Foreign Office inclosing copy of one received from Vice-Admiral Wellesly Commanding Her Majesty’s naval forces on this Station, in which he states the names of the vessels to be employed in maintaining order at the Canadian Fisheries and forwarding a copy of the instructions which were to be issued to the commanders of those vessels.”

This enclosure appears on p. 600 of the same volume, and it is the letter I have just read from Mr. Cardwell. So, in 1870, a copy of Mr. Cardwell’s letter was sent to the American Secretary of State, just a year before the treaty is made in 1871, pointing out the meaning which we are attaching to the words “in common” in the treaty of 1818, words which, of course, were continually the subject of consideration as the relations of the two countries became delicate from time to time in the absence of proper treaty regulations between them. The United States made their treaty in 1871, with a knowledge of the meaning that we attached to these words. They insert them in the treaty of 1871 with that knowledge, and Mr. Boutwell issues subsequently his circular with that same knowledge. In dealing with the words “in common” it is important to observe that the United States construe them just as we construe them.

It is suggested in the pleadings of the United States that they are words of some special and peculiar technical import. I do not know what that peculiar, technical import is. I think they are ordinary words used in their popular sense. I shall deal shortly with the supposed technical import of the words. I do not think they have any. They are words used by the inhabitants of both countries in speaking of the same thing and used in exactly the same sense. They were so used in 1871. What are some of the other uses of these words, because, after all, the best way to test the words is to see how they have been used. I am not going to define them, because anyone who knows the meaning of English knows the meaning of these words. They could only be defined by other English words, which might be treated as equally ambiguous, but they are words common to every language. In every language there are words of equivalent meaning, such as on the same terms or under the same conditions, and if you are using them in relation to the political status you say under the same jurisdiction.

But let us look at the other instances of the user of these words between these parties, which fully disposes of the suggestion that the



words had some special or technical significance proper only  
995 to the grant of a fishery between private persons. Take Jay's  
treaty of 1794, p. 17 of the British Case Appendix. In article  
3 it says that it was intended to render the local advantages set forth  
"common to both." That is all that the words mean. Now, let us  
come to the use of the words by Mr. Adams. I wanted to get at the  
instances, and I have gone through the correspondence carefully, in  
order to try and discover instances where the framers of the treaty  
used the words. Surely these authorities show the use of them better  
than dictionaries and better than any lawyer seeking to put a  
technical meaning upon them. What did they mean when they used  
the words "in common"? Take Mr. Adams, for instance, British  
Case Appendix, p. 67. I am reciting this simply, in order to show  
that he is using them as words bearing a well-known and ordinary  
popular meaning, and not as bearing any technical meaning. He  
says:—

"In adverting to the origin of these liberties, it will be admitted,  
I presume, without question, that, from the time of the settlements  
in North America, which now constitute the United States, until their  
separation from Great Britain, and their establishment as distinct  
sovereignities, these liberties of fishing, and of drying and curing fish,  
had been enjoyed by them in common with the other subjects of the  
British Empire."

Mr. Adams is writing to Lord Bathurst. He is not using the words  
as words of any technical import. They would have been thrown  
away upon that noble lord, who knew nothing about grants of fish-  
eries. He read the words as he would read any other letter addressed  
to him in the English language.

It is now suggested that there is another question; that there is  
such a thing as a "common fishery," and that there is another grant  
known as a "common of fishery," and the United States is very  
uncertain and hesitating in saying that the words are used in that  
technical sense. I do not know what it is that the United States  
gains by this argument or suggestion. It has not developed it very  
carefully in this case. It may be that Mr. Root intends to develop  
it more fully later on, so I must say something about it. We have  
got different kinds of fishing in England, and I suppose that the  
United States has the same laws in regard to this subject. What  
are these laws? I need only mention two, because it really comes  
down to two. You may have a "common fishery" and also a "com-  
mon of fishery." A "common fishery" is a fishery such as is enjoyed  
in tidal waters, not appropriated as an exclusive fishery. Of course,  
in many tidal waters, by Royal grant and other means, fisheries have  
been granted away to private persons. Where there has been no such  
grant and there remains a common, or public right, it is called a

"common fishery," a public fishery. It cannot be suggested, I suppose, that the fishery on the coast of Newfoundland was a fishery described, as between England and the United States, as a "common fishery." If so, I do not see how it advances the United States argument. Of course, call it that if you like; to give it a name does not endow the United States with any sovereign powers over it. There is no question in a "common fishery" of ownership or sovereignty, except the general sovereignty over the whole territory which runs out to the fishery in the open sea or in tidal waters. So, it is not applicable as a meaning of the words "in common with British subjects." Then there is the other phrase "common of fishery," this phrase relating entirely to the grant of a private fishing right where the owner of the fishery has granted to one or more persons the use in common with himself. That is called, in technical English language, a "common of fishery." You might have a "common of pasture"; you might have various kinds of "common," not of fishery alone, and nobody in this correspondence has called this right a "common of fishery." If Mr. Adams had written to Lord Bathurst, and said: "Will you please to give us a "common fishery"? Lord Bathurst would have wondered what on earth he was talking about. Such an expression would have been wholly inapplicable to a liberty granted as between two independent States. So that no technical expression that I know of in the English municipal law in which the word "common" occurs in connection with the grant of a fishery or fishing is appropriate or may be applied to those words of the treaty. They are not technical words at all. It is not a grant of a "common fishery"; it is not a grant of a "common of fishery." The King does not propose to fish "in common" with the President of the United States. That is purely a private right. Words of a technical character relate solely to private rights and could not be transferred to a document of this kind between such high contracting parties.

I have read with some difficulty and embarrassment the pleadings of the United States which suggest that the words "in common" have some technical meaning. They have none, and I think the United States would have done better to have stuck to its contention that it has to strike them out altogether as being perfectly  
 996 useless, or as having application only to a purpose which nobody could suggest as serious. The words therefore have no such technical application.

But I will just follow this a little farther, and it will not take long to look at the correspondence between the parties where the same words are used to show that they are used in the ordinary untechnical sense. For instance, take the very significant use of them in the letter from



Lord Bathurst to Mr. Adams at p. 71 of the British Case Appendix:—

“As to the origin of these privileges, in point of fact, the undersigned is ready to admit that, so long as the United States constituted a part of the dominions of His Majesty, the inhabitants had the enjoyment of them, as they had of other political and commercial advantages, in common with His Majesty’s subjects. But they had, at the same time, in common with His Majesty’s other subjects, duties to perform;”

The user of the words “in common” has no legal, technical signification whatever, because he is speaking there not only of the rights in the fisheries as being “in common,” but he is speaking also of duties; he goes on to say that they had “at the same time, in common with His Majesty’s other subjects, duties to perform.” So, we find that the words “in common” are used in relation, not merely to a fishery, as to which the United States suggests that they might have a technical significance, though I cannot see it, but they are used in relation to political and commercial advantages, and not only in relation to political and commercial advantages, but in relation to duties. It cannot be suggested—I am sure Mr. Root will not suggest—that there is anything technical in the words there, and yet the words are being used by Lord Bathurst in a letter to Mr. Adams. Here you have the words being used by the persons who framed the treaty, and, as we know, they were introduced by the British Plenipotentiaries. What meaning can be attached to them? They are words which can be translated direct into the French and other languages without any loss to their meaning.

The Tribunal will have no difficulty whatever in construing them. Taken with their context they mean that the individuals being called in, namely, the inhabitants of the United States, are to exercise that right on the same terms as the individuals by whom it is already exercised—that they are to exercise the right together in common. Then, happily, we have an instance of the way in which the words have been construed by an American judge. I refer the Tribunal to the Fur Seal Arbitration: Proceedings of the Tribunal of Arbitration at Paris, Case of the United States, vol. ii, p. 124. This is a case dealing with the claims of Indians and the judgment is given by C. H. Hanford, judge. It is in relation to the treaty rights of the Indians which have already been explained by one of the preceding counsel. Judge Hanford says:—

“It has been further contended on the part of the defence that this vessel was especially privileged to engage in the sealing business in Behring Sea by reason of the fact that her owner and crew of Indians are of the Makah tribe, and by virtue of the treaty made with said tribe of Indians, whereby ‘the rights of taking fish and of whaling and sealing at usual and accustomed grounds and stations is further

secured to said Indians in common with all citizens of the United States and of erecting temporary houses," &c.

You have the same words there as between the Indians and the inhabitants of the United States. Then the learned Judge goes on to say:—

"It is obvious, however, from the language above quoted, that the treaty secures to the Indians only an equality of rights and privileges in the matter of fishing, whaling, and sealing. The guaranty is of rights in common with all citizens of the United States, and certainly such treaty stipulations give no support to a claim for peculiar or superior rights or privileges denied to citizens of the country in general."

I only mention that because it is an illustration of the use of the words, showing that they are being construed according to their ordinary and popular sense.

Mr. Turner said that the words were very readily accepted by the American Plenipotentiaries, so readily accepted that they must have been harmless or the American Plenipotentiaries would not have taken them without demur. Mr. Turner is right, they were accepted at once; brought forward, I believe, almost at the last conference and without the slightest observation they were accepted. Why? Because they exactly expressed everybody's intention. Before I came to deal with these words, I thought it right to put before the Tribunal the correspondence of the parties to show that from the first nobody doubted that they were to come under the sovereignty or the jurisdiction of Great Britain, and therefore when words are brought forward which indicate that effect to them the United States take them with-

out demur, without objection and without observation. We have  
997 got, therefore, the plain words, and I have to make this further observation that, in order to give any effect to the contention of the United States, you have to re-write the first clause of this treaty altogether; in fact, I hope before I am finally done with the argument, to show that you have pretty well to re-write the whole of the article in order to give effect to the contention of the United States in each of the seven questions submitted to the Tribunal. I have now reached the end of the note that I have made on this part of the case. I shall next deal with servitudes, but perhaps it would not be inconvenient if I should not begin with servitudes until to-morrow.

SIR CHARLES FITZPATRICK: Would a grant of fishing rights to two persons, to be enjoyed as to one subject to regulation, and as to the other without regulation; be called a fishery right enjoyed in common by both of the grantees?

SIR W. ROBSON: Certainly not. I speak without any hesitation whatever in saying that, as a matter of English law a right granted under such inequality of conditions could not possibly be called a right in common. It might be a fishery in common in the sense that



they were both there and could be fishing at the same time, and it might be, more or less at the same place, but the right would be absolutely a different right. My learned friend, Mr. Peterson, who is an authority upon this part of the case, speaks with the same positiveness, as I have ventured to speak myself. That would not be a right in common at all, and lawyers would not so describe it. So that, in so far as the technical part of the case is concerned, my submission is that the United States have not shown a case. I do not know what may be coming, but, at all events, upon the documents submitted, and upon the oral argument, the United States have shown no case whatever for their suggestion that these words have some technical and peculiar import which has the effect of conferring some ownership upon the United States. Such import is not known to, at all events, the English lawyer, and I shall, await with interest to hear from what English authorities it can be said that any sanction is given at all to that contention or suggestion.

THE PRESIDENT: The Tribunal will adjourn till to-morrow at 10 o'clock.

[Thereupon at 3.55 o'clock p. m., the Tribunal adjourned until to-morrow, Tuesday, July 26, 1910, at 10 o'clock a. m.]

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THIRTIETH DAY: TUESDAY, JULY 26, 1910.

The Tribunal met at 10 a. m.

THE PRESIDENT: Will you please continue, Mr. Attorney-General?

THE ATTORNEY-GENERAL, SIR WILLIAM ROBSON (resuming): Before proceeding to deal with servitudes, a subject upon which I propose to invite the attention of the Tribunal to-day, I find I omitted yesterday a small point, but one which might perhaps be treated as important by Mr. Root, therefore I had better deal with it for a moment or two.

It was suggested by Mr. Turner that when the sum payable under the Halifax Award fell due to be paid, Mr. Evarts, on behalf of the United States, expressed unwillingness to pay unless he could get some satisfactory assurance from Lord Salisbury as to the claim to jurisdiction being then put forward by Lord Salisbury in connection with the Fortune Bay dispute.

The two events coincided. The amount payable under the Halifax Award was, of course, in respect of the treaty of 1871. The excess in value of the advantages conferred on the United States by Great Britain as compared with those conferred by the United States on Great Britain under that treaty.

Well, under that treaty, or during the period of that treaty, the Fortune Bay dispute arose, and then it was that the United States

contested the authority and right of Great Britain to exercise jurisdiction over the American fishermen who were said then to have broken the regulation by fishing on Sunday.

The correspondence in relation to these two separate matters coincided, and I think may easily cause a little confusion, unless one is careful to distinguish the letters and telegrams relating to one matter from those relating to the other.

998 I think Mr. Turner has not quite kept those matters apart in his mind when dealing with this point, because his suggestion was that the money was not paid under the Halifax Award unless and until Great Britain gave an assurance on this very matter of jurisdiction, which Mr. Turner suggests it did, and thereby abandoned for that time at all events its claim as put forward now.

I think this is a misapprehension. The real reason why there was any difficulty or dispute about the payment of the money under the Halifax Award had nothing to do with the question of jurisdiction or the dispute that arose in Fortune Bay. It had to do with a totally different point, which was strictly material to the award, namely, whether or not the Arbitrators on that occasion had exceeded their jurisdiction.

There were various other matters which arose, quite unnecessary for me to go into, where I have so much to deal with, but there was a delay in paying the amount due under the award, and there was on the part of the United States an objection to paying that amount, but it was simply and solely in relation to those points that were connected with the award, namely, have the Arbitrators dealt here with something beyond their powers, and ought they or ought they not, under the terms of the award to be unanimous? Those are the two questions, and I think, inadvertently, Mr. Turner has not kept them quite apart.

Mr. Turner, at p. 2988 [p. 494 *supra*] of his speech, reads a letter from Mr. Evarts inviting the attention of Lord Salisbury to this question of jurisdiction. That letter was written, as indeed the disturbance happened in Fortune Bay, at a time when there was also this difficulty about the jurisdiction of the Arbitrators. He gives the date of the letter and proceeds to read it. He says Mr. Evarts makes this remark:—

“In the opinion of this government, it is essential that we should at once invite the attention of Lord Salisbury to the question of provincial control over the fishermen of the United States in their prosecution of the privilege secured to them by the treaty. So grave a question in its bearing upon the obligations of this government under the treaty, makes it necessary that the President should ask from Her Majesty's Government a frank avowal or disavowal of the paramount authority of Provincial legislation to regulate the enjoyment by our people of the inshore fishery, which seems to be intimated, if not asserted, in Lord Salisbury's note.



"Before the receipt of a reply from Her Majesty's Government, it would be premature to consider what should be the course of this government should this limitation upon the treaty privileges of the United States be insisted upon by the British Government as their construction of the treaty."

Now, says Mr. Turner, when Mr. Evarts wrote that he had the payment of the Halifax Award in his mind, and what he meant was, unless you disavow this claim of jurisdiction you do not get the money under the Halifax Award. Of course I am putting it in very blunt terms, but Mr. Turner suggests that was clearly what was meant. Well, I think it was not, because when one looks at the very same letter, which is on pp. 656 and 657 of the United States Case Appendix, one sees that Mr. Evarts himself is careful to distinguish between the two subjects which were then engaging the attention of both Governments. The letter is on the Fortune Bay dispute. It begins on p. 652, and he sets out all the circumstances relating to that dispute from the United States point of view. He says nothing whatever about the payment of the Halifax Award.

Then at the bottom of p. 656, the very last line, or perhaps I had better read the last paragraph, he says:—

"I cannot but regret that this vital question has presented itself so unexpectedly to this Government, and at a date so near the period at which this Government, upon a comparison of views with Her Majesty's Government, is to pass upon the conformity of the proceedings of the Halifax Commission with the requirements of the Treaty of Washington."

Now, having dealt with the jurisdiction question, he says, "I am sorry this question should arise at a time when we are all ready—when we have our hands full of this other question, namely, the Halifax Award." And then he goes on:—

"The present question" (that is the jurisdiction point) "is wholly aside from the considerations bearing upon that subject, and which furnishes the topic of my recent despatch."

And then he goes on to say, "We must have from the British Government a frank avowal or disavowal of its attitude on the jurisdiction question." Having first pointed out that there are two questions he says, "The one I am dealing with now, namely, the question of jurisdiction, has nothing to do with the other one which formed the  
999 subject of my recent despatch." That was the question of the Arbitrators exceeding their powers and making an award which was not valid, and under which, therefore, no payment should be made.

What he calls his "despatch" is one of the 27th September, of which there is a separate print.<sup>a</sup> It appears in a separate print pre-

<sup>a</sup> Appendix (E), *infra*, p. 1379.

sented to both Houses of Parliament, and I read only one sentence from it—quite sufficient to show what I want. It deals entirely with this question of whether the award was good or not, and says:—

“Accordingly the sum appropriated by Congress to meet the Award is, by the ‘Appropriation Act,’ placed under the direction of the President of the United States with which to pay the Government of Her Britannic Majesty the amount awarded by the Fisheries Commission, lately assembled at Halifax, in pursuance of the Treaty of Washington, if, after correspondence with the British Government on the subject of the conformity of the Award to the requirements of the Treaty, and to the terms of the question thereby submitted to the Commission, the President shall deem it his duty to make the payment without further communication with Congress.”

It has nothing to do with the jurisdiction of England in Fortune Bay. It is a long letter, and goes on discussing whether or not the award is in conformity with the terms of the treaty.

THE PRESIDENT: I suppose, Mr. Attorney-General, this document has been communicated to counsel for the United States?

SIR W. ROBSON: I think so. I am told it has.

Then Lord Salisbury wrote in answer to the letter of the 28th September, and said of course there was no intention on the part of Great Britain to limit in any way the rights of the United States (United States Case Appendix, pp. 657 and 658). He says, on p. 658:—

“I hardly believe, however, that Mr. Evarts would in discussion adhere to the broad doctrine which some portion of his language would appear to convey, that no British authority has a right to pass any kind of laws binding Americans who are fishing in British waters; for if that contention be just, the same disability applies *a fortiori* to any other power, and the waters must be delivered over to anarchy. On the other hand, Her Majesty’s Government will readily admit—what is, indeed, self-evident—that British sovereignty, as regards those waters, is limited in its scope by the engagements of the treaty of Washington, which cannot be modified or affected by any municipal legislation.”

That is the position we take to-day. I cannot anticipate that with regard to these principles any difference will be found to exist between the views of the two Governments. Now, says Mr. Turner, that was treated as a disavowal of the claim to jurisdiction on the part of Great Britain. It was a mere assertion of the position from which we had never varied, and, upon that disavowal being communicated to the United States Government, the United States Government paid the money under the Halifax Award.

So that the incident is put before the Tribunal as if the United States had said: We won’t pay this money which has been awarded against us unless you disavow your claim to jurisdiction over American fishermen, and Lord Salisbury had given the disavowal, and the result is that the money was paid.



When one comes to look at the document that is not by any means an accurate statement of the fact. The real truth is that, when the award was made, there was, on the part of the United States, a technical objection, and the money was held up for that reason. While the money was being held up, or some time shortly antecedent to it, the Fortune Bay dispute took place. Mr. Evarts says, "I have now got to make a complaint about Fortune Bay, but do not let us mix that up with the other question as to the validity of the award. I am not keeping your money back because of the Fortune Bay incident; I am keeping your money back because of this new objection which has arisen in connection with the validity of the award." He makes that a little clearer, as I am reminded by Mr. Peterson, on p. 662 of the Appendix to the Case of the United States (Mr. Evarts does), because he says there, in the middle of the second paragraph on that page:—

"I was exceedingly unwilling that the questions arising under the award and those provoked by the occurrences in Newfoundland should be confused with each other,"

THE PRESIDENT: Where is that?

SIR CHARLES FITZPATRICK: The last words of the second paragraph.

1000 SIR W. ROBSON: "I was exceedingly unwilling," it says—

"that the questions arising under the award and those provoked by the occurrences in Newfoundland should be confused with each other, and least of all would I have been willing that the simultaneous presentment of the views of this Government should be construed as indicating any desire on our part to connect the settlement of these complaints with the satisfaction or abrogation of the Halifax award."

It was a confusion very easily made, and no one could be blamed for making it, but when one looks into it, it will appear that Lord Salisbury never for one moment made any disavowal of our claim to jurisdiction, neither was he invited to do so by Mr. Evarts as a condition of paying the money under the Halifax Award. It would not have been a very legitimate thing to do, and the United States did not do it, but, I think Mr. Turner was under the impression that that had been done, and that therefore it made a very strong point against Great Britain, to the effect that you are now putting up a claim which you disavowed, and in a sense disavowed for value received in 1878.

JUDGE GRAY: It would not have been, as you say, a very legitimate thing for the American Government to have suggested, unless it was supposed that the claim put forward by Lord Salisbury of jurisdiction in large bays, like the Bay of Fundy, was a curtailment of the right of the American fishermen, as understood in the Halifax Award,

and as part of the basis of their decision, but, that you contend is disavowed by Mr. Evarts?

SIR W. ROBSON: Yes, I am much obliged to Mr. Justice Gray. That point would have made it legitimate, if Lord Salisbury had been really claiming to have cut down the grant. Then he would have put himself so much in the wrong the United States would have been entitled to say, although this is your money, or may be your money, still, you have adopted an attitude which really terminates diplomatic relations. That might have been, in that point of view, a fair thing to do; but it is I think only a slight and not unnatural misunderstanding, owing to the complexity of dealing with so great a correspondence, which was upon so many matters, and I pass over it.

I come now to a subject which I am quite sure the Tribunal will receive with a certain degree of philosophic interest, though I am afraid with some sensation of physical fatigue, for I come to the question of servitudes, which has played so great a part in this controversy, and which has excited so very great interest throughout juristic and legal circles in Europe, because, as I said in my opening observations upon this question, we are touching here the broadest principle and the deepest foundation of all, that which we call international law, a name which is itself slightly misleading, but which is sufficient for the purpose; nothing is more important to nations at large than that our conceptions with regard to international law should be carefully guarded and clearly defined; that we should not permit in that sphere any degree of unnecessary laxity, that we should not treat it as a mere matter of philosophic speculation, but remember in dealing with it that we are touching on matters concerning which every nation is most sensitive, and concerning which our principles should be extremely well defined. Well now, why is the United States compelled, why is it driven to servitudes in defence of its claim?

It is to be pointed out at once that the whole of that claim, so far as it rests upon any avowed legal basis, rests now on this doctrine of servitudes. They do not treat the historical part of their case as affording what lawyers call a ground of action. It may be interesting and important. It may have a bearing upon the construction of the documents which have passed between the parties, but it is not the thing which entitles them, according to their own view, to your judgment. Now, so far as it is said to have any bearing upon construction, I have dealt with it fully, I hope not too fully.

I come now to deal with what remains to them of their ground of action, the question of this international law as affecting the contract.

They are faced of course with this difficulty, namely, that they are claiming sovereign rights, the things for which nations fight, and for which patriots suffer, they are claiming these sovereign rights with-



out any admission on the part of the alleged servient State under which they can say that such rights were given to them. The ordinary rule of law is of course clear enough.

Great Britain has entered into a contractual or treaty obligation. It is, as we say, like any other treaty or contractual obligation.

Take, for instance, such well-known obligations as a treaty under which one State permits another to enter its harbours for purposes of trade. There is a right given to a foreign State over the territory of another State. The ships may enter the harbour. When they get there, in pursuance of an undoubted right, in pursuance of a right over the territory of another State, would anybody contend that they must not obey the orders of the harbour-master? Nobody would. They have got a right to enter the port, and that means the whole port. They might argue that means any part of the port, but the moment they get within the port, the harbour-master says you must go here or there. You have your right, indeed, to be here within this harbour, but you are subject to my regulations, and they affect you at every step, they affect you in the very matter of the time and manner of the exercise of your right. You have come here to load or discharge a cargo; I, the harbour-master, representing the local jurisdiction, tell you you shall not do it to-day, you may not do it to-morrow, you shall do it on such a day as I find convenient in regard to the general business of my port.

Nobody would doubt there that the harbour-master would be right.

The United States would not suggest that the captain of the ship would be entitled to say: Oh, my right to come here is territorial, you have not given me a mere ordinary trading obligation, you have given me a right to enter your gates, to stop on your soil, or in the water that covers your soil, and because it is territorial I am a specially privileged person.

Such a contention as that would never be dreamed of, nor would it be dreamed of on the part of the commercial traveller who comes also under treaty. He comes there to compete with our own tradesmen and manufacturers in the sale of goods. He has a right to enter the gates of our territory, a right to remain there, a right to claim the protection of our laws, and he also would be entitled to say: You have put no restriction upon my right, look at your treaty. There are hundreds of these treaties passing continually under the observation of the lawyers who have to advise Governments in trading countries—hundreds of such treaties. We do not find any restriction saying, for instance, that a trader is only to trade on six days a week. The commercial traveller might say, I am not a Sabbatarian, I do not want a day's rest; your population may want a day's rest, I do not; and my treaty says I am to trade. Everybody knows that the commercial traveller putting up such a claim would be de-

rided. Nobody would suggest for a moment that such an obligation as that fails to carry with it all the laws which will attach to the exercise of local jurisdiction.

Then take another example, the right to build a railway. Amid all the complex relations of States you may have one State (it may be a great one or it may be a little one) becoming entitled to assist its own industrial interest by extending one of its State railways through an adjacent territory. It would ask and obtain the right to extend its railway, and it would be given to it, not merely to its inhabitants, but to its Government, a stronger case than the present. The Government would be entitled to continue the building of the line, but when it comes into foreign territory does anyone suggest that it is in a different position to the ship-owner whom I have just mentioned, who sends his vessel to a foreign port?

Yet here we find that there is a difference set up. In the case of a State building railways or warehouses in a foreign territory, the Government is said to have a right totally different in character to that of the ship-owner. In this case, though not in the case of the ship-owner or the commercial traveller, these serious consequences in regard to sovereignty are said to attach to the privilege granted. Why this distinction? It is not a distinction which has any right or foundation in the reason of the thing. There is no practical reason, there is no logical reason, why you should say to the possessor of the first right, namely, the right to enter harbours: You must obey the local jurisdiction, and you should say to the possessor of the second right, the right to build a railway or a warehouse, you are exempt from the local jurisdiction; no sort of reason in the nature of the thing—none whatever.

Is there any other ground of distinction? There is no reason for that distinction in the contract—none. You look at the contract itself and you do not find there anything which indicates that the right to fish should be treated as anything different, or the right to come and fish, which is the better way of putting it, should be treated as in any way a different right to the right to come and discharge a cargo, or load a cargo, or enter the heart of the territory and trade. So that the contract gives you no ground for any such distinction. If there is none in the nature of the thing, and none in the contract between the parties, is there any ground for implying that the parties intended it, though they failed to express it?

What reason is there for any such implication as that, an implication of such a portentous character, left unobserved, left to inference implication, or mere speculation? That is the position to which  
1002 the United States are driven. They say: We seek here to imply that which the parties never agreed to. It is to be implied as a matter of alleged law. The parties not only never agreed to it,



but Senator Turner, stating this as he did with such fullness and also with a desire to be accurate, would not go so far as to say that the parties knew anything about the law which was the foundation of the implied term that he was setting up. He would not go so far as to say that the parties knew what they were doing. Of course, he expressed himself, properly enough, in rather guarded language about it. The Tribunal put him a question. I have no doubt he implied they ought to know, but he would not say they did know. Some questions were put to him on this point by Sir Charles Fitzpatrick. Sir Charles Fitzpatrick wanted to know—because it was in the early stage of his argument, and he had not developed it as fully as he did later—whether his argument went to the extent of saying that a nation could part with its sovereignty, or some measure of its sovereignty, without express words. Mr. Turner said that he did go that far, and then he added, p. 2636 of the report of the proceedings [p. 433 *supra*]:—

“I do not say that the negotiators of the treaty had all this array of learning that we have had here upon that subject, at all.”

There he was right. Until Mr. Turner had imparted his learning to the world it may safely be said that no one in the world knew as much about it as Mr. Turner did, or ever had known as much about it as he did.

“SIR CHARLES FITZPATRICK: That is quite clear.

“MR. TURNER: I say that it was clearly the only use they had in mind.”

That was the use of the words “in common.”

“Quite possibly if they had been fully informed of the law relating to servitudes they might not have thought it necessary to employ these words at all . . . if they had been fully informed of the law.”

So that, Mr. Turner does not suggest that anybody knew all about these servitudes. Yet the nation has parted with its sovereignty not merely on an implied term, but on an implication founded on a law not known to the nation itself. Well now, if that is the way in which a servitude may operate, it operates as a sort of trap. You grant your right thinking that all you have parted with is the right to take a few herrings; you grant it freely and in your magnanimity. Lord Bathurst, trying to establish friendly relations between the two countries, thinks he is doing it rather cheaply; he thinks that all that is given away is the right to take a few herring, but, he has not foreseen Mr. Turner. Now, it appears that the law attaches to this grant these serious and amazing consequences.

Let us see what people did know about servitudes. I do not mean what jurists said about servitudes, because, after all, they are sitting

quietly in their studies speculating upon everything that this concept may import, while the Lord Bathursts and the Mr. Adamses, and the Mr. Monroes are out in the busy world, not studying international law, but fighting for the liberty of their States, or even the empire and dominion of their States. Let us see what these men, engaged in the active affairs of life, know about this concept. I have had, with the assistance of my industrious and learned friends, this record searched for instances in which the word "servitude" occurs anywhere in correspondence, treaties, and so on, and in the whole of these Appendices I have found three instances of the word occurring.

The first instance has been drawn to the attention of the Tribunal. It was in a letter by Mr. Gallatin after the negotiations for the treaty of 1818 had been concluded and he was writing giving an account to his colleagues at home of the progress and result of these negotiations—writing a letter in a spirit which was intended to vindicate his own sagacity, making little of the concessions he had made and much of those that he had received, not an unnatural spirit, no doubt, for him to adopt. And he says: We had a great deal of difficulty over our fishing rights; they were very obnoxious to Great Britain. They were construed—he did not say they were construed by Great Britain—but he said they were construed as being a servitude, or what the French called a servitude. He did not say that the British called it a servitude, but still the sentence reads as if it might be that the English considered it a servitude. That is the only mention of the word in all the negotiations that preceded the forming of the treaty, or that immediately followed, and it is not a mention of the word as between the parties. It is not an observation addressed by Mr. Gallatin to the English negotiators, or to an American colleague, and he does not ascribe the use of the word to an Eng-

1003 lishman at all. But, I am not unwilling to admit, at all events hypothetically, for the purpose of the argument, that it is just possible that some idea of the kind may have been present to the minds of some of the negotiators. It does not affect my argument to admit it because I see a curious trace of some difficulty of the sort in the correspondence. There is a letter of Lord Castlereagh which I had noted to have read yesterday, but which slipped my memory at which I am surprised in myself. I forgot it, but really it was of more value than much else that I did quote. At p. 177 of the British Counter-Case Appendix there is a letter from Lord Castlereagh to Mr. Bagot, dated the 22nd March, 1817. I need not read the early paragraphs of the letter, though they have a slight bearing upon it, but just the important paragraph, which is the second paragraph from the top of p. 177:—

“Undoubtedly no negotiation could be entertained which might, in its form, seem to imply any doubt on the part of this Government



as to the sovereign rights of Great Britain, but as Mr. Monroe persuades himself that the British Government upon further inquiry, might, without prejudice to its own interests, accede to the proposition, which he was desirous of making to them through you, His Royal Highness authorizes you to learn from the American Government the precise extent and nature of the accommodation which it seeks to obtain."

That is a very significant paragraph. I need not have troubled about any sentences yesterday which involved the slightest possibility of ambiguity with this paragraph there because, what is the fair construction to put upon it? What does it indicate? In the very sentence previous to it, which I ought to have read, it says:—

"The Prince Regent fully approves the motives which induced you to decline receiving any counter projet from the American Secretary of State."

They were refusing to receive any counter project from the Americans. Then, Mr. Monroe had succeeded in making Lord Castlereagh, or some other English representative, believe that it would not hurt British sovereignty.

"No" says Lord Castlereagh, "negotiation could be entertained which might . . . . seem to imply any doubt . . . . as to the sovereign rights of Great Britain." Mr. Monroe persuades himself and has persuaded Lord Castlereagh that Great Britain need not fear that. So that, if anything was said about servitudes it strengthens my case. It shows that although probably the word "servitude" is never mentioned, because only the French, apparently, talked about servitudes, and inasmuch as the word was unpleasant in its import it would not be used by the Americans to Great Britain, still, there was the idea that this proposition to obtain British territory for a specific and economic purpose might possibly attach to it a servitude. Now Lord Castlereagh says, as Mr. Monroe thinks not, we are prepared to think it over and we will hear what they have to say. There is the only mention of the word "servitude" and when one comes to look at the surrounding circumstances it is not a mention which helps the case for the United States.

JUDGE GRAY: Is the word mentioned there?

SIR W. ROBSON: No; I say the word is not mentioned, but it looks as though the thing had been the subject matter of consideration. The word is only mentioned in the letter of Mr. Gallatin and then mentioned as a French term rather than as one which had passed between the parties.

Now then, I come to the second mention of the word in the record, and that is in a speech made by Mr. Trescott before the Halifax Commissioners. It is in the British Counter-Case Appendix, at p. 187. Mr. Trescott is arguing for the United States, and he says this:—

"They have never been raised by our Government, and probably never will be, because our claim to fish"—

These are the words—

"within the three-mile limit is no more an interference with territorial and jurisdictional rights of Great Britain than a right of way through a park would be an interference with the ownership of the property, or a right to cut timber in a forest would be an interference with the fee-simple in the soil.

"MR. THOMSON: Do you mean to say there would be no interference there?"

"MR. FOSTER: Certainly not. It would be simply a servitude. You do not mean to say that my right to go through your farm interferes with the fee simple of the property?"

1004 "MR. THOMSON: It does not take away the fee simple, but it interferes with my enjoyment of the property.

"MR. TRESCOTT: That is another question, because compensation may be found and given. I simply say that it does not interfere with the territorial or jurisdiction right. That is the view I take of it, at any rate, and I think I can sustain it, if it ever becomes necessary."

Of course, it is quite true that Mr. Thomson says: I do not want you on my farm with your right of way; it is an interference with my enjoyment; and Mr. Dwight Foster replies that it does not interfere with your ownership or with the fee simple, it is a mere servitude, not touching territorial or jurisdictional rights. It is a mere thing attaching to the property, but not affecting the ownership. It affects the enjoyment, but not the ownership and, when applied as between states, it does not touch the sovereignty.

There is only one more mention of a servitude and that is in the same Appendix, British Counter-Case Appendix, p. 207. I had better just state the facts shortly. It is a quite modern instance this; it is in 1909 and from the fact that servitude comes to be mentioned here, it looks as if it must have leaked out somehow or other that the United States were thinking about servitudes. The United States entered into a negotiation with Colombia in relation to a right which was being sought under a treaty which appears on p. 4 of this Appendix, and I desire to direct attention especially to article 6. It is signed by Mr. Root in 1909; so that it is a modern treaty:—

"The Republic of Colombia grants to the United States the use of all the ports of the Republic open to commerce as places of refuge for any vessels employed in the canal enterprise,"—

That is in connection with the making of the canal—

"and for all vessels in distress passing or bound to pass through the canal and seeking shelter or anchorage in said ports, . . . .

"The Republic of Colombia renounces all rights and interests in connection with any contract or concession made between it and any corporation or person relating to the construction or operation of a canal or railway across the Isthmus of Panama."



There is what would be called a servitude. That was in 1909. But Colombia seems to have had rather better information about what was passing through the minds of the United States than we had, and so it wanted to know whether this was going, or how it was going to affect its rights as to sovereignty. Mr. Urrutia, p. 207 of the British Counter-Case Appendix, who is writing the letter translated on that page, draws attention to the article in the second paragraph as follows:—

“Nevertheless, since some of the honourable Members of Parliament and other citizens of this country see in the slightly obscure wording of this article an obstacle to the approval of the compact in question, I take the liberty of begging your Excellency to be good enough to ask the Department of State by telegraph for the authority necessary to sign a protocol or a note explanatory of this said Article VI, by which it may be clear that the enjoyment granted by Colombia in the said article should be understood solely as a right of refuge and as an innocent favor to ships in difficult circumstances (*relâche forcée*), such as International Law recognizes and that this enjoyment remains subject to the conditions and practices established by the same, without any diminution of the sovereignty of Colombia in her ports.

“In this manner then that innocent enjoyment stipulated for under the name of harbourage in no way signifies right or servitude which could limit the absolute exercise of the sovereignty which Colombia possesses over her ports, roadsteads, bays,”—

They put in bays—

“gulfs, and territorial seas, nor limits the unrestricted dominion over them of her laws, nor does it give to the United States power to exercise jurisdiction or to carry out any work such as piers, repairing stations or other works of a similar nature.”

Then, Mr. Dawson replies to them from the American Legation in a letter on the same page. I only read a short paragraph:—

“Except for such waiver of anchorage and tonnage dues, the said Article is not intended to, and does not, involve any breach of Colombia’s sovereignty over her ports, nor affect the unlimited jurisdiction of Colombian Laws over them, nor give to the United States any right to exercise jurisdiction in them,”

1005 In so far as I know, and I only say in so far as I know for fear that I might be assumed to say that I have read the whole of these papers, and I will make the confession without shame that I have not, because I do not believe that anybody else has—but certainly in so far as I know—and I have read a great many of these papers and have had still more read for me—I do not know of any other use of the word “servitude” than these three that I have mentioned. So that it does not seem to have been a very familiar thing.

The correspondence with regard to the Colombian question was two months after this reference, and perhaps the apprehension of Colombia may have been aroused by something that they had heard

in diplomatic circles, and they therefore took care to keep themselves straight. Colombia wanted no arbitration upon this question apparently.

We asked Mr. Turner: what is a servitude? and Mr. Turner certainly did not shrink from that question. He defined a servitude, and he defined a servitude as things very often are defined by those who are going to use the definition for a particular purpose, in order to extract from his definition what he wanted he very properly put it there first and then proceeded to draw, by easy, simple, and logical processes, the necessary deductions. Starting, for instance, with reference to this right of fishing, obviously, the United States thought: What sort of a definition do we want to get for this right of fishing? And so they choose their definition. I do not find it in the authorities that are cited; it may be there for the very industrious who may pick it out by fragments, but it is not there in very explicit form. What is it? It gives to the servitude three features or characteristics. First, he says, it must belong to a nation. I should say something about that. It does not belong to a nation merely because a nation is a party to a contract which confers a right upon particular individuals. That does not give a nation property in the thing being dealt with. The next requisite is that it must be permanent. I think that part of the definition must have been laid down without full consideration of the ultimate purpose to which the definition was to be applied, because this right is not permanent as to the whole of it, and I do not know, I am sure, how it can be said that one part of a right is to be severed from the other and belongs to a totally different class of obligations, because the right to dry and cure is not permanent. It is dependent upon the continued unsettlement of the places where drying and curing may be carried on. It would therefore be classed as a temporary right. Then, third, it must make one territory serve the uses of another. That was very necessary to the definition when Mr. Turner started out, but he could not keep it up throughout the whole of his very long and erudite speech. It went, it disappeared, because ultimately he found he could not keep to the territories of the United States, which had been convenient for the purposes of his argument at the beginning. He began with the territory of the United States as the *prædium dominans*, but he had to let that go and he had to put in its place, not the territory of the United States, but the sovereignty of the United States, so that, later on, the predial element disappears. It will be very useful to observe how it did go. I am not quite sure whether I have in their place the references, but I am sure I will come across them at some later stage in my note. But I say that when one takes the definition that is put into these three propositions, as the United States have put them, it will be seen that



not one single element of the definition remains at the end of the argument.

Mr. Root may try to restore it, but I think it will be found that the definition disappears entirely when compared with the authorities and with the facts.

Having stated what the servitude is that I have to deal with, how it is defined and how I shall propose to attack the definition, I now ask myself: What are the propositions that the United States must make good in order to apply this servitude, so defined, to this contract? What must they prove? They must make good four propositions. First, they must show that the doctrine of servitudes was, at the date of the treaty, part of the international law; otherwise, of course, it could not be made the basis of any implication or implied term in the treaty. A treaty between States, like a contract between parties, is the law of the parties. It is the law by which they are content to be judged in relation to the particular transaction and, of course, they do not trouble to put up the whole body of law which governs them in the contract. They treat it as the basis upon which they are contracting. Two merchants, who are making a bargain for the sale of goods, do not set out the whole of the municipal law as binding them. They treat that as understood and known to both parties and then they make clear and explicit only those terms which are particular to themselves. Of course, the law must be clear; the law must be known. It must not be assumed that two States or two individuals are contracting with reference to a particular law unless it is quite clear that there is a law and that both of them shall and do know what they have done. The first proposition they must make good is that the doctrine of servitudes formed a clear, a universal, or a widely known part of international law. They do not show that.

But, however, I take their next proposition. They must show that such servitudes brought about, not a mere limitation or restriction of sovereignty, such as is common to all parties who make any contract, because everybody who enters into the simplest obligation to that extent fetters his future action, and sovereignty does not mean that a State is not to fetter its own action if it pleases. Its sovereignty would be worth very little unless it were able to enter into binding and durable obligations which hamper its future conduct for its own good. So that, merely to say that a State limits the exercise of its sovereignty is not to say that it is transferring sovereignty or detracting from its own self-governing and legislative power. The United States, therefore, have to show that there is something more than a limitation of sovereignty attaching to the notion of a servitude and that the servitude imported a transfer of

the sovereignty itself, not a mere restriction upon the exercise of the power.

Then, the third proposition, and it is perhaps the most important of the propositions and the one in regard to which they have failed most completely, has reference to the extent of the servitude, namely, that its effect in making a transfer of sovereign Power was well known, and not merely well known, but, speaking substantially, universally known, at the time of the treaty, because you cannot import that as an implied term unless the parties could be reasonably taken to have known it. Of course, in municipal law we are bound to know the law. In municipal law, one of the maxims of our own law, and I dare say some analogous maxim will be found in the law of every country, is that no man can excuse himself for a breach of the law by pleading ignorance of the law. But, when we are dealing with international law, a law founded on consent, you have to prove the existence of your law, just, as in a contract between private parties, you would have to produce a statute, or prove, in England, where we have much law not dependent upon statute, that the obligation is founded in what is called the common law of the land. In international law you cannot produce your statute. There is none. There is nothing but the practice of States, but if you are going to treat this practice of States as binding the parties, in the absence of express stipulation, you must show that they knew the law and contracted with reference to it, or that it was then so widely known that the parties to the contract might reasonably be assumed to have known it, that they ought to have known it and could not have helped knowing it.

That is the third proposition, and the fourth proposition they have to show in order to establish their case is that the right of fishing was a servitude. I think on each of the four they will be found to have failed to have produced any relevant evidence whatever, because it is not a mere question of weighing evidence and saying: Is it quite enough to meet the burden of necessary proof? In a question of that character it is even this: Is there any evidence at all—any to be considered with regard to these four matters?

Those are the propositions they have got to establish; and the next question that occurs to one in examining this doctrine is: How are these propositions to be proved? How are they to be proved, before we ask are they proved or not? What is the method and only method open to them of proving those statements which it is incumbent on them to establish? I have already indicated, in putting both the propositions themselves, the mode and the only mode by which they can be proved. Mr. Turner and I are there quite in accord. He laid down very clearly an indisputable and sound proposition of inter-



national law, that international law depends on the practice. There is not, of course, any universal legislative parliament. There is no body of nations competent to make law for all nations; and as laws cannot be made by any international parliament, because none exists, the place of that parliament cannot be taken by ingenious and philosophic gentlemen dignified by the name of jurists—a most learned and invaluable class, but they have their limitations, and I venture to think that they have recognised their limitations. They have safeguarded their speculations in a way which is entitled to recognition, and which I shall hereafter explain. But they cannot make laws. There is no parliament to make laws. Then international law is really, in this respect, another name for custom. I do not want to lay down propositions which may be hereafter sought to be applied beyond the scope of the argument to which they relate. It is a very dangerous practice. I am only laying down my propositions in reference to this case; and I say that what Mr. Turner had to prove here was an international custom or practice of States estab-

1007      lishing these four propositions of his. In order to show that they were part of international law, it was not enough for him to produce these learned authorities who talked about servitudes as if they were part of international law. That is not enough. He must produce instances of the action of States, treating servitudes as part of the law, and expressing themselves as bound by that law. He has not done that. And in the same way, as to the nature of servitudes, that they carried with them the consequences in regard to sovereignty that I have described. He must put himself in the position of showing that, by the practice of States—not merely by written contracts, because I will show something about that later on; a written contract may be an exception to the practice; a written contract may supersede all questions of custom or practice—he must put himself in the position of showing that, in the absence of a written contract, by the practice of States, servitudes had this consequence. He does not show it. He does not attempt to show it.

He has, therefore, to establish, as I have said, a custom. And I dare say that all the members of the Tribunal are familiar with the manner in which a custom is proved in municipal law. There is no difference in the manner of proof in international law. One has the case of two merchants in a particular trade, making some very short contract, the terms of which can scarcely be gathered from the print or from the document, because they are so elliptically expressed, so curtly and shortly expressed by men of business. Why is the contract so short? Why do they not set out all the terms with regard to delivery and inspection and so on? Because the custom of the trade gives them all these benefits, and they are contracting with reference

to the custom of the trade. Well then, supposing that the contract comes into Court, and the question is: What is the obligation of one of the parties under the contract? There is nothing about it in the document, but he says: "I will prove a custom." And then he proves his custom—calls persons who say: "Whenever such a contract is made, without the necessity for any express stipulation whatever, the practice of the parties is to do so and so; to allow such and such an inspection, within such and such a time;" so that custom is always proved in the absence of a written document. You do not prove a custom by saying: "Merchants make written contracts"; because in that case, it is the contracts that speak and not the custom. The custom is proved in order to make good some shortcoming in the written contract, and to prove that such and such a course of conduct is always followed without a written contract, by the mere ordinary course of business of the parties.

JUDGE GRAY: I do not know, Sir William, whether I quite follow you there, and I should like to ask a question for my information, if you do not object?

SIR W. ROBSON: I am very happy, Sir, to answer any questions.

JUDGE GRAY: There is a certain class of so-called servitudes which I believe exists between nations. They call them servitudes, perhaps, for want of a better name. They exist by reason of neighbourhood, propinquity; and certain concessions that might be attributed to comity, that do not rest on contract.

SIR W. ROBSON: No.

JUDGE GRAY: But servitudes generally, as I think you said a while ago, must depend for their creation upon a written contract?

SIR W. ROBSON: Yes.

JUDGE GRAY: So that there is no practice to which we can be referred in interpreting a contract apart from the contracts themselves?

SIR W. ROBSON: No.

JUDGE GRAY: I do not quite understand, then, what is the custom that must be applied to the assertion of the existence of a contract, in order to determine whether that assertion can be maintained. Do you mean that the custom to which we must be referred is in regard to the interpretation of a certain class of contracts?

SIR W. ROBSON: Yes; but, Sir, you have put your finger, if I may say so, on the very point that I am just about to make. I think that I will answer your question if I just pursue the course of my argument, because you are here meeting exactly the very point which I am now approaching.

JUDGE GRAY: Take your own method, of course.

SIR W. ROBSON: If you will allow me, I think you will see that I shall answer your question in the regular course of my argument. If not, I shall revert to it.



1008 I say that is what is meant by proving a custom in municipal law. Now, if you want to make good some shortcoming in your contract in international law, in a treaty, by saying that custom attaches such and such a consequence to the grant of a particular right, you must prove it not by showing that in such and such a contract made between other nations that consequence was attached by express terms, because the answer is: "Yes; they did it expressly. You are not doing it expressly." You have got to prove that the consequence attaches even in the absence of an express stipulation; and in order to prove a custom to that effect, you must prove that it did attach in a long series of instances also in the absence of an express stipulation. That is what you must prove.

Here I come to the point indicated by Mr. Justice Gray. I say that you cannot do that in international law. You cannot do it. You cannot supplement a written contract in international law in this particular case of servitudes by a reference to customs. You can in other cases, but not in servitudes. And why? Because a servitude must be in writing. The whole contract must be in writing. So that, taking the law of servitudes, the first essential feature of it is that your servitude must be constituted in writing; that the writing with regard to your servitude must be a complete writing; it must not merely constitute a general right, and leave the consequences of that right to inference or evidence. That will not do. If you say in municipal law that a certain class of contracts must be in writing, you must have the whole contract in writing. Now, in international law, whatever difference there may be among jurists as to characteristics of servitudes, they are all clear about this: They must be in writing. It was so in Roman law. In Roman law if you wanted to make a right, an ordinary contractual obligation into a servitude, or have it treated as a servitude, you had to show your pact; you had to show your solemn stipulation. So, in international law—I say this is the very first proposition to be collected from the authorities—no nation can prove, or would be allowed, in view of international law, to prove any consequence of a servitude, especially one of such substance as that it shall affect sovereignty, unless it can show a writing. It cannot prove a custom; because writing is necessary. I begin by saying Mr. Justice Gray is quite right in pointing out that this looks like a vicious circle. It is a vicious circle; but it is a circle in which I have my friend Mr. Turner. It is his circle. You cannot prove, you cannot make good a missing term in your contract—that is, the term as to the transfer of sovereignty; that is what I call the missing term; you cannot make it good unless you prove that, in the absence of a written contract, States have always inferred that wherever a servitude was granted, rights of sovereignty were transferred. But you are not allowed to prove that; because every jurist

tells you that you must not seek to add to the terms of your contract by custom or implication, because it is an essential and fundamental law of servitudes that all the terms shall be in writing. They say again and again that you cannot, by constituting one obligation, or derogating from one sovereign right, go on to infer from that limitation of sovereignty any other limitation of sovereignty. You shall not do by inference that which you have not done by contract.

Just let me draw the attention of the Tribunal to the unanimity of the writers upon this point. I do not think the Tribunal need trouble to go to the references, because we have had them so often. Mr. Turner was obliged to take, naturally, in opening such a case, a very long time in referring to references, and in giving the references. I have references for every passage to which I refer, and perhaps I may deal with them shortly by stating them. I shall give the references, too, for the sake of the note. I say, therefore, these are the positions that I am on.

You must put your contract of servitude into writing. That contract must be express, explicit. It must be complete.

Those are the three qualifications: The writing; an express contract; a complete contract.

SIR CHARLES FITZPATRICK: Of course that does not apply to a servitude as between private individuals?

SIR W. ROBSON: No. As between private individuals, of course, there may or may not be any writing. But this applies, as Sir Charles points out, to the realm of international law. And I am going to show by the authorities that they are all agreed on this point.

SIR CHARLES FITZPATRICK: Yes.

SIR W. ROBSON: Take, for instance, the first of all the writers who, as Mr. Clauss says, divested the concept of a servitude of its  
1009 purely municipal character, and raised it from being a matter as between individuals into being a concept applicable as between the mediatised German States—not international; he did not say that; but he said they “cannot be extended beyond the explicit sense of the agreement.” He is the first——

THE PRESIDENT: Who is that?

SIR W. ROBSON: Engelbrecht; that is on p. 62 of Clauss. That is an ambiguous sentence. They get more explicit as they go on.

Martens says:—

“These . . . . owe their origin . . . . to agreements only.” [Clauss, p. 77.]

Karl Zacharia, the first of the two Zacharias, says:—

“State servitudes are contractual obligations, and are to be judged as such by the principles in force among nations in general in regard to agreements.” [Clauss, p. 82.]



Römer says—and this is a very valuable statement:—

“No general principles of the positive law of nations can be established for its”——

That is, the legal condition of servitudes—

“treatment”——

In Römer's opinion—

“because servitudes have to be judged only and solely by the agreements with reference to each of them in particular.” [Clauss, p. 89.]

Each servitude to be judged by its own agreement; there must be one, and you cannot go outside that agreement to find out what are the characteristics and consequences of your servitude. You must not do it. This is pinning the United States down to this treaty. What it wants is to get outside of this treaty. It has got nothing in its treaty about a servitude affecting sovereignty, and so it emerges from its treaty, and goes out into international law; and the moment it gets into international law, it is sent back again to its treaty; because international law says: “No, No; keep to your agreement.” That is what I think Mr. Justice Gray points out, and that is how I really meet his question. It is the United States that is making the attempt to get away from its agreement—to write something into it. And the United States turns to Mr. Clauss, and Mr. Clauss, instead of blessing the United States, curses the United States; because he collects all the authorities who say: “Go back to your agreement, and stay there.”

Then Mr. Turner, feeling that, says: “The extent of the servitude right must depend on the terms of the treaty.”

Well, now, it is really summed up by Mr. Clauss, in dealing with what Heffter, Gönner, and H. A. Zacharia say. He sums it up in this way, at p. 206:—

“it must always be assumed, in case of doubt, that the government of a servient state intended to impose as little a restriction on itself as possible; that everything that was not expressly turned over to the foreign state remained subject to the national sovereignty of the servient state. Fundamentally considered, the national sovereignty must be considered in interpreting treaties on state servitudes, to extend over the national territory until such sovereignty is expressly removed.”

Now, “expressly” means in writing: You cannot remove the national sovereignty, you cannot transfer the national sovereignty, until you have got a written document saying you may do it.

The whole effort of the United States here—in fact, it is vitally necessary to its case—is to write into that treaty this doctrine of the transfer of sovereignty. Where is it to get it from? It tried history first. History would not do. That was the theory about inheriting

sovereignty by reason of its sacrifices and its successes in war. That was given up. Then it turned to international law. And, as I have said, international law says: "I cannot help you. My view is, and every authority confirms it, that you cannot get beyond your treaty. It is no good. You are trying to prove a custom. International law will not allow that there is any such proof possible, because although a custom would suffice in municipal law—in municipal law a custom would add such a term to the contract, when once that custom is proved—custom will not do in international law, even if you have the material for proving a custom, because we insist on writing."

That is why I said a few moments ago that the jurists must be fairly treated in this matter. The jurists have safeguarded the law concerning which they were writing. They have not assumed to lay down the law. They do not pretend that their opinions and speculations make law for great States. They put up no such pretence. They have been quoted in great number as though they did, but that is not really the view that they take themselves of what they are doing when they speculate on servitudes. They say: "We may speculate as we like, but whenever any nation comes to claim any advantage or power as the result of a servitude grant, it must not look to us; it must not look to custom; it must look to its treaty, look to its document. If it can find there any clause stipulating for a transfer of sovereignty, it has established its sovereignty; but if it cannot, so far as the voice of international law has anything to say on the matter, it says distinctly: "Then you must go without the terms that you desire to imply, because international law says you must have it there, or else you cannot act upon it."

And when these learned jurists are speculating about servitudes and so on, they are really generalising, in a philosophic spirit, upon actual treaties. I have gone through the list of alleged servitudes in these authorities. There are a great many of them, very much of the same character. They are easily grouped. I do not propose to trouble the Tribunal with the results of all that research. They are very easily grouped into different classes—servitudes about garrisons and the passage of troops and matters of navigation, and so on. But really, the jurists are simply seeking to give some kind of philosophic grouping and connection to these different kinds of written documents. But they are all written documents—all of them. And they do not help the United States in proving a custom, because each one speaks for itself. In fact, the more treaties there are about servitudes, the more impossible it is for the United States to prove a custom. The fact that the different Powers have made treaties about them shows that they do not rely on custom. They negative the idea that there is any custom.



JUDGE GRAY: May I, Sir William, ask another question, merely for the benefit of your comment?

SIR W. ROBSON: Certainly, Sir. I shall be very happy.

JUDGE GRAY: May not the position of the United States be taken to be this: Not so much an assertion that there is a custom recognised by international law which attaches to a contract and makes part of it, as it does in municipal law, but that, looking to the contract, and confining yourself to its four corners, you find a certain relation established by that contract, or sought to be established; and if it has certain characteristics, attributes, qualities, whatever you may call them, then you may refer to international law, and if you can find that a relation with such characteristics is denominated a servitude, then you may apply it to the relation between them?

SIR W. ROBSON: Yes. That puts the case for the United States shortly, and in its most powerful form: Namely, that if you find a right conferred with certain characteristics, that is, the three features to which Mr. Turner referred, and you find in international law that such a right is denominated a servitude, and you find that a servitude has certain consequences attaching to it, when once it is established, then, undoubtedly, you get your case home. I will take up each step: First of all, you do not find a servitude everywhere defined as Mr. Turner has defined it. Secondly, although called a servitude, it is nowhere shown or alleged that it carries with it the consequences in regard to sovereignty that Mr. Turner seeks. That is my next step. Of course there are one or two authorities who say so, but I am dealing with it now, as a matter of general authority, and also as a matter of practice. There is no such consequence attaching to it in practice. So that I really meet Mr. Justice Gray's observation there by a reference to the facts.

I agree that if, having once constituted your servitude, you could show that it was recognised by States, and that when recognised by States, it always carried with it these known consequences, even without any stipulation to that effect (which is the present case), then that would be all that the United States would want. But the way in which I say they fail is: They show no such practice. Secondly, if they could, it would not help them in this case at all, because international law says: "Practice will not do. Custom and conduct will not do. You must prove your agreement. And  
1011 you must show, by your agreement, not only that a right is granted, constituting that which may be called a servitude, but according to international law you must show that your agreement attaches to the servitude the consequence for which you contend." And this agreement does not do it. And, in fact, I do not think any agreements do. Not only is there no custom apart from treaty, but I do not think there are any treaties—or at least very few;

perhaps I should not say that there are none; it is not necessary for me to prove it—there are very few treaties that have got this consequence of a transfer of sovereignty attached to a servitude.

DR. DRAGO: It seems to me that the question of servitudes has been studied by the United States, objectively, taking the terms of the treaty itself into consideration and comparing its status and its consequences with the Roman and the modern civil law. At any rate the introduction of the law of servitudes into international law is founded in similarities and analogies with the old Roman law. This being so, I suggest that the analogy should be carried further, referring the question to what the French call *la personne juridique* or juristic person of the State, considered not as a political or sovereign entity, but as a corporate body or corporation acting within the sphere of private law, with the capacity of acquiring rights, of owning property, of burdening it with *jura in re*, of contracting obligations, &c. Could not this question be referred to the juristic personality of the State aforesaid, and then consider what the issues would be, as distinct and apart from the political state and its sovereignty?

SIR W. ROBSON: Yes; that, of course, is what has been done with regard to servitudes. You begin with a notion applicable entirely to private law; that is to say, to owners of property as between themselves. There the concept of a servitude is, of course, simple, intelligible, and the name servitude appropriate; it is not a name involving any humiliation, or any loss of personal status. It burdens one piece of land with an obligation in favour of another piece of land. There the notion of a servitude fulfils a useful purpose. No questions of sovereignty can arise there. They are questions of ownership, and not of sovereignty.

Then, the next step was among the mediatised German States, to use this same concept, borrowed from purely private law; because the mediatised German States really were held originally on feudal principles as properties, rather than as governments. That is to say, the first notion of government, which prevailed when the feudal system began to fade away, was the notion of a government founded on property. The governor or sovereign was *dominus terræ*; he was lord of the land. His imperium was really founded upon dominion. It was government founded upon ownership. And thereupon the Germans thought that it was an easy and natural step to take this concept of servitude, quite appropriate as between private owners, and apply it as between public owners, treating sovereignty as a form of ownership.

It began then to be much less applicable, much less appropriate, because the notion of sovereignty imported a great many things that were entirely foreign to ownership. It began then to be much less



and less applicable, until at last some writers say it is applicable to sovereignty alone.

The question I am dealing with is: Is that a proper application of this concept, borrowed from private law? In the course of my argument I hope I shall show that it was an unfortunate and improper transfer, or application, of a concept proper only to ownership.

DR. DRAGO: In this very same case of the fisheries, you referred a moment ago to the building of a railway: The State may contract for the construction and building of a railway. It then enters into a private compact, which does not affect its sovereignty. Could not the State enter into a compact of the same kind, as relating to the fisheries? I mean, the juristic person of the State?

SIR W. ROBSON: Yes.

DR. DRAGO: Without affecting its sovereignty? That is my question.

SIR W. ROBSON: I think so, quite well. Quite well; it could, as long as it does it by contract. Nobody has anything to say against it.

DR. DRAGO: But the treaty is a contract between nations. Could it refer to matters which do not affect sovereignty?

SIR W. ROBSON: It not only could do it, but it does. A State may make, for instance, with regard to a railway, a contract with  
1012 another State, giving that other State any rights it pleases over its own territory, for the purposes of the railway. I say that that is properly done—call it a servitude, if you like. If you merely call it a servitude, and do not begin to attach to the servitude all kinds of consequences not intended by the parties, I have no complaint at all. I think such servitudes are proper and should be encouraged.

But the United States goes further. It says: "When once you have constituted such a right, then in comes Mr. Clauss and Mr. Jurist, and they say: 'No matter what contract the parties have made about that right, they have constituted a servitude, and therefore we, in the name of the law, attach to that servitude consequences with regard to sovereignty that the parties had not attached themselves.'"

It is quite easy, and it is highly commendable, that States should make contracts as between themselves; that is to say, as between themselves as sovereigns, in relation to their own territory. They can do it. They can do it without affecting sovereignty; and my case is that they do it without affecting sovereignty.

One of my complaints of the doctrine of servitudes is that the name itself is one which does not encourage the grant of such rights. I think it an unfortunate name. And even when it is kept strictly to its narrowest limits, it does harm in international law; because the rights which are called servitudes are rights which ought to be encouraged by every means in the power of any State. It is to the good

of mankind, to the good of individual States, and to the good of the whole civilized community, that each State should be encouraged to open its territory to other States, either for economic purposes, or for purposes of general beneficial intercourse. I say they may do it, and I say that the existing international law allows them to do it, without danger. They may do it as sovereigns. They may put their territory, as sovereigns, under all kinds of obligations of the kind which we have heard called real obligations. They may say: "You may come to our territory and fish, or build railways, or build warehouses. You may do all these things." I say that those are highly meritorious grants to make; that they must be made, and they are made, without any consequence whatever of a character derogating from the sovereignty of the States. That is my case.

So that I accept the suggestion of the learned arbitrator that such contracts can be made. I say they can be made, and ought to be encouraged. No State ought to be deterred from limiting the exercise of its own sovereignty in any of these respects. It ought not to be deterred from doing it. And certainly it ought not to be deterred from doing it by being afterwards informed that when it has done it, without ever intending to touch or affect its sovereignty, it has affected its sovereignty because of the view now put forward with regard to international law in reference to servitudes.

DR. DRAGO: Of course what I have said is only to suggest an aspect of the question, to be taken into consideration.

SIR W. ROBSON: Yes. I am obliged to the learned arbitrator for that reference, because I think it helps me to lay stress upon the importance of this Tribunal, in dealing with this great question, so framing its judgment as not to allow of any discouragement to States in making obligations *inter se*, which may open the territory of one to the inhabitants of another without any detriment to the sovereignty of either. That, I think, is the thing we should all aim at. And my own belief is that international law, as it is now constituted, does that. International law, when it is thoroughly considered, as it stands to-day, does allow a State to open its territory freely, to limit the exercise of its own sovereign rights in certain particulars, without any detriment to its other sovereign rights or its general national sovereignty. That is, shortly, my case.

The case for the United States is: "No! If any State is inconsiderate enough to open its territory to another by permanent treaty, the moment it has done that, it has, without saying so, derogated from, diminished its own general rights of government, within the limits of its own boundaries." That, I say, is a very serious consequence, and it is against that I am struggling in this argument, which, I am afraid, is lengthening more than I had intended; although I shall try to finish it to-day; because, after all, it is very



general. It consists in broad propositions, which are not very difficult to put, although they involve, no doubt, a good deal of distinction.

SIR CHARLES FITZPATRICK: The distinction made by my brother Drago I understand to be that with reference to States there may be the distinction between the dominium of the State and the imperium; that is to say, with reference to the dominium, the State may dispose of its dominium, as a private individual; but with respect to imperium, that is not a matter of sovereignty.

SIR W. ROBSON: I am much obliged. That assists me to understand, perhaps, a little better, the point of the learned arbitrator. States may do what they like with regard to their property. In so far as they are owners, they may subject their property to any obligation that they please. I say they may do it without any danger to their sovereignty. That is to say, they put what obligations they like upon themselves as lords of the land. A State may submit its dominium to these rights, without any derogation from its imperium, although I doubt the advisability of encouraging a distinction between territorial sovereignty and other sovereignty.

DR. DE SAVORNIN LOHMANN: When you distinguish between imperium and dominium, then the whole question, I think, is at an end.

SIR W. ROBSON: Yes. The national sovereignty, that is to say, general sovereignty, what I prefer to call legislative and executive power, really is a thing which ought not to be confused with questions of ownership. It moves in a different sphere. You may do what you please with regard to giving material interests of particular advantage in your State; that simply relates to material profit, and has, really, no proper connection with—

DR. DRAGO: Has it not with the sovereign entity of the State?

SIR W. ROBSON: None at all. It is a different function. The State, while dealing with material interests of that kind, and with mere property, is behaving like an owner. But that ought not to affect its functions and its duties and its powers when we pass from the sphere of property into that of government. But that is what the United States are seeking to do. That is the whole difference between them and us on this side of the room. We say: "You may grant all such obligations freely touching ownership, but the grant of any rights you like to make does not affect government, jurisdiction, or imperium."

THE PRESIDENT: For instance, if a State "A" cedes a part of its territory to a State "B," for having a railway station at the frontier. Does that imply that the officials of the foreign railway, the railway of the foreign State, who come into the territory of the State that has ceded this part of its territory for constructing the railway station, cease to be under the legislation of the State where they act—that they come under a state of extra-territoriality?

SIR W. ROBSON: I should say, in such a case as that, the official of the State "B" who came into the territory of the State "A" of course retains his personal obligation to the State to which he belongs; but the moment he enters the territory of "A" he comes under the jurisdiction of "A."

THE PRESIDENT: He comes under the jurisdiction of "A."

SIR W. ROBSON: Yes; and he must even exercise all his rights of ownership under the jurisdiction of "A," because "A" has given him his right touching the land which he is entitled to appropriate, but "A" has not said: "When you come on that land, I am going to give you extra-territoriality." He has not said that. Of course he might say it, by treaty and in that case he is bound.

THE PRESIDENT: Of course.

SIR W. ROBSON: It may likewise say to the railway guard: "The moment you come on to this territory you bring your national rights with you, and are judged by them, and not by mine." I do not know of its having been done, but that is exactly the right which the United States is seeking to attach. I say that the railway officer of the nation "B" comes on to the territory of "A" and becomes for the time being a citizen of "A," is subject to the laws of "A." For instance, if no provision is made to the contrary, it would be the right of "A" to say to "B": "Now you are sending here on to this territory dangerous commodities"—

SIR CHARLES FITZPATRICK: Your contention, briefly, is that a State may part with a share of the public domain, either in favour  
1014 of a citizen of that State, in favour of the citizen of a foreign country, or in favour of the Government of a foreign country?

SIR W. ROBSON: Yes.

SIR CHARLES FITZPATRICK: But in all those three aspects, with respect to the property within the territory of the country granting it, they are all in the same situation?

SIR W. ROBSON: In the same situation. They are just like other persons who also have got the rights of ownership in the same territory; that is to say, they are subject to the local jurisdiction. It is the essential difference between dominium and imperium, which, as one of the learned arbitrators has just pointed out, has to be considered. The State may, as national government and sovereign, grant rights of a private character, either to its own citizens, as Sir Charles suggests, to the citizens of another country, or to the government of another country. But, having done it, it has not thereby diminished its own power of government, either over its own citizens or over the citizens of another country, or over those who exercise on behalf of the Government of another country a right given to that Government. That general sovereignty is a thing wholly apart and not affected by the grant of particular territorial rights, as the United



States say it is affected. And their only ground for saying it is—not that it ought to be, as I have pointed out; there is nothing in the nature of the thing to show that it ought to be; there is nothing in the contract to show that; but they say it is in international law, and it has crept in from private law; it has crept into international law from the Roman law. That is what they say. And I must, I suppose, briefly examine the authorities they have put forward in support of that proposition. How closely and narrowly such rights are granted is shown by H. B. Oppenheim. I am only just going to read one or two authorities. I now refer to p. 4 of H. B. Oppenheim:—

“An international servitude is always a special law, and can never be extended beyond the letter of the Convention.”

This shows how very closely the jurists really have guarded themselves against misconception on this head:—

“An international servitude is always a special law, and can never be extended beyond the letter of the Convention. Thus the German fundamental treaties, especially the concluding act of Vienna of May 15, 1820 . . . . ., do indeed grant the central power an executive authority against disturbances which are getting beyond control in individual states; but by no means a right of garrison beyond the time of the disturbances.”

That is a very good illustration. It was necessary in the great settlement of Europe under the Treaty of Vienna to deal with certain smaller states in which disturbances might be expected, under the new political arrangement. And so, Mr. Oppenheim points out, while it gave to the central European power certain privileges and rights in the way of repressing disturbances, yet the treaty stipulated that they should leave immediately afterwards. There was a clear stipulation intended to safeguard sovereignty. And when you go through all these treaties—I am not now speaking of customs, because none exist—but when you go through all these treaties, you find how carefully the establishment of a territorial right is guarded from excess, from abuse. They do not allow, as a general rule, in these treaties, any territorial right to be carried so far as to impinge upon national independence; because that is what general sovereignty is. The mere exercise of what has been called territorial sovereignty—a very inappropriate name, and an unfortunate name, because it mixes up imperium with dominium; mixes up sovereignty with ownership and the two things ought to be kept apart—wherever you do find any grant made which affects the right of a State in its territory, you will find the treaty also guards that right from being construed or treated so that it might touch or limit sovereignty. The States have been careful to do that by treaties. It was certainly never allowed in the absence of a treaty.

DR. DRAGO: In continental legislation the distinction is made between the public property of the State and the private property of the State.

SIR W. ROBSON: Yes; of course, in olden times there was no such distinction. In the theory of English law every owner of  
1015 land and property is still a tenant of the Crown; he is a tenant in fee simple. That is, of course, a merely historic survival of a very ancient state of things. Now the State property is, of course, a well-defined portion of the national territory, held exactly like that of any private owner.

I will just finish with these few quotations. They will only take a moment.

Neumann says: Servitudes depend on treaties. [Sec. 13.]

And he adds this important sentence, which I think is a very useful one:—

“Their . . . exact determination . . . depends on treaties.”

He says that on p. 1 “their exact determination”—meaning, when you want to ascertain whether or not there is some particular consequence attaching to the establishment of a servitude, you have not got to argue about it, you have got to look at your document. If you find that particular consequence is attached in your document, you must submit. But he says the presumption is always in favour of sovereignty; that is to say, unless you have got in your document some clearly expressed fetter on general sovereignty, you cannot put it there. You must not read it in. No implication will do. And that is why I say when the United States, finding their treaty not enough for them, turn to the law, every jurist sends them back again. Every jurist says: “We cannot assist you by presumptions against sovereignty. Our presumptions are in favour of it.” And they are acting, there, upon the sound instinct that what are really mere privileges, touching property, ought never to be construed as privileges touching sovereignty. They ought no more to be so construed in the case of a foreign State than they are in fact so construed in the case of a private person, or the subject of one’s own State. It is that distinction which, I say, the jurists have kept in mind, which I respectfully ask the Tribunal also to keep in mind.

Pasquale Fiore says:—

“No restriction [on autonomy of state] can be based upon presumption.”

Calvo says:—

“In all these cases necessity creates the servitude of passage, the right of which is confirmed and regulated by special treaties.”

These are what Mr. Turner called the modalities, which are such an essential part of a servitude. If you constitute your servitude you



have against you all the presumptions of law. And therefore, if you really want to have your servitude so that you can exercise it freely, and without interference from the servient state, you must have special treaties to regulate it; because you can exercise no right at all unless you can point to a written stipulation in its favour.

Then Hall says: Servitudes—

“are the creatures not of law, but of compact.”

That is a short and picturesque way of putting the point that I am endeavouring to submit. You must not range through international lawyers to find out what your rights are if a so-called servitude has been created. That is not the sphere within which you must look for the definition of your power. You must look to your compact. “Servitudes are creatures not of law, but of compact;” and as such they are very strictly construed.

I shall now take, quite hypothetically, this question of custom—but perhaps as I have reached a new point, the Tribunal would prefer to take a recess at this moment.

SIR CHARLES FITZPATRICK: If during the adjournment you have a moment of leisure, I should like to have you look at paragraph 6 of the Treaty of Paris, on p. 8 of the British Case Appendix, as a very good type of what would be called a negative servitude between individuals.

SIR W. ROBSON: I am much obliged to you, Sir.

[Thereupon, at 12:5 o'clock P. M., the Tribunal took a recess until 2 o'clock P. M.]

1016 AFTERNOON SESSION, TUESDAY, JULY 26, 1910, 2 P.M.

THE PRESIDENT: Will you kindly continue, Mr. Attorney-General?

THE ATTORNEY-GENERAL, SIR WILLIAM ROBSON: May I just make an observation now, with regard to the particulars of objection on the part of either Great Britain or the United States, as to any executive or legislative Act of which they complain.

We handed in particulars of objection to certain acts of the United States in sending vessels of war to these waters for the purpose of preserving order.

It seems to me it is not worth while, for Great Britain at all events, to trouble the Tribunal with any such question. It depends upon the answer to be given to Question No. 1. If Question No. 1 is answered in favour of Great Britain, then nobody would deny that the sending of warships to these waters was not legally justifiable, although quite honestly and courteously done, and not intended really as an attack on the sovereignty or self-respect of Great Britain; still we need not trouble about it further, it is not worth while discussing, it is done; it is a mere historic incident, whichever answer is given to the question.

Therefore I think it unnecessary for Great Britain to trouble the Tribunal for any judgment upon that particular executive act.

We do not ask for compensation. It would be quite unnecessary, and I am sure we would not desire to mention or talk of such a thing as an apology, or anything of that kind, because I believe if we did not assent in terms, we certainly very nearly did so in fact, and the assistance rendered by the vessel was very valuable. Instead of complaining of it, I think we should be disposed rather to make some expression of thanks to Mr. Alexander, who was very useful indeed in calming the perturbed spirit in that place, and at that particular time. So that our complaint may be treated as withdrawn.

THE PRESIDENT: Perhaps Mr. Senator Root wishes to make an explanation.

SENATOR ROOT: If it please the Tribunal, the United States submits a statement of specific provisions of certain legislative and executive acts of Newfoundland and Canada which we call to the attention of the Tribunal for action pursuant to Articles 2 and 3 of the special agreement of the 27th January, 1909.<sup>a</sup>

This is done at this time in pursuance of the expression on the part of the Tribunal which is incorporated in the Protocol of Tuesday, the 19th July.

The paper which we submit has been communicated to the counsel for Great Britain. This paper contains a detailed statement of the particular provisions of the statutes and regulations which have already been specified or mentioned in general in the note from the American agent to the British agent which is in the record.

Any further oral statement will be given in the course of the remaining argument on the part of the United States.

With regard to the last clause of the expression by the Tribunal which is in these words:—

“If the counsel of the respective Parties desire to submit to the Tribunal, either orally or in writing, any view or suggestions in regard to the subject matter of article 4 of the special agreement, they will be heard or received at the convenience of counsel.”

counsel for the United States have under consideration the question, not altogether easy of solution, as to whether it would be useful or practicable to make any suggestion of any value upon that subject in advance of the Award.

Any rules which may be formulated by the Tribunal under Article 4 would necessarily depend so largely upon the language of the Award that we have not yet seen how we can make any useful suggestions.

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<sup>a</sup> Appendix (C), *infra*, p. 1369.



We have it under consideration, however, and will be at any time ready to conform to any further expression on the part of the Tribunal.

THE PRESIDENT: Thank you, Sir.

THE PRESIDENT: Now, will you kindly continue, Mr. Attorney-General?

SIR W. ROBSON: With regard to the particulars of objection put forward by the United States, which the learned senator has  
1017 been kind enough to hand to us, I might say that I have not had an opportunity yet of considering them. Their consideration may perhaps be delayed.

THE PRESIDENT: Oh, of course.

SIR W. ROBSON: Resuming my argument, I may say that the article in the Treaty of Paris, of which Sir Charles was kind enough to remind me, was a good instance of a negative servitude, and also a very good instance of the care with which such a servitude is accompanied in order to leave no doubt whatever as to the extent and the way in which it may limit sovereignty. This is a capital instance of that. The King of Great Britain concedes the Islands of St. Pierre and Miquelon in full right to His Most Christian Majesty, to serve as a shelter to the French fishermen, and so on. This is a cession of territory for a particular purpose. And, His said Most Christian Majesty engages not to fortify the said islands, and so on, so that it is an instance of a negative servitude, and to erect no buildings upon them, but merely for the convenience, and so on, and to keep a guard of fifty men only for the policing, leaving other rights of course intact.

That is a very fair instance of what I am demanding in this case, explicit documentary stipulation as the only basis upon which any claim for either limitation or transfer of sovereignty can be based. That is really the substance of my argument.

Well, I think I have sufficiently argued the proposition which I set out to establish, namely, that you cannot affect the sovereignty of a nation except by a written document, and if your written document is in any way defective—I should not say defective, that is not a very happy choice of term—but if your written document merely establishes a right or grant or liberty, without purporting to diminish sovereignty, further than by such limitation as is necessarily expressed in the “liberty” itself, that you cannot seek to add terms to your agreement by any international practice. That is what I said. Because your agreement must be express and complete, and you cannot seek to enlarge its scope, or add to its provisions, by referring to any international practice whatever, because the international law says that for the consequences of a servitude you must look only to your agreement, international law will not make an agreement for you. So that I state two propositions, which at first sight might

have seemed to be scarcely consistent until explained. I said the United States cannot enlarge this agreement except by proof of some international custom, which is the same thing as "practice." And then, having established that, I said you cannot prove an international custom, because when you go to international law to get your custom, international law sends you back to your agreement, and says you must depend upon that alone.

In a few words I am going to take up the case of my learned friends opposite on the footing that custom is sufficient, that international law would permit them (of course I do not agree with this for a moment, I am doing it quite on the basis of an argumentative hypothesis) that they may by international law enlarge the scope of this agreement by proof of international custom.

Then I ask them now: Where have they proved such a custom? They have not even attempted to prove it. We all know how a custom is proved. I have referred to that already. It is proved by persons familiar with the particular trade or sphere of action concerned coming and saying that, without any contract at all, we, the persons in this trade, consider ourselves bound by this or that course of business, this or that particular act. So that it is a law for us without the document.

No attempt like that is made on the part of the United States. None. They said international law will help us. International law depends upon practice. In other words, it is the same thing as international custom. International custom enables us to enlarge this contract by putting into it fresh terms. Very well, then I ask them: How do you prove your custom? Where do you prove it? Give us an instance. Easily done, if you have an international practice. Give us a single instance of a case where a nation has submitted to loss of its sovereignty except under some express written stipulation. That is the case we want, in order to meet this case, because we have no express stipulation here; and the United States say we are going to get it from custom. Very well, where is your custom? You cannot get it by saying there have been a large number of treaties made between nations in which servitudes have been established with this as an accompaniment of the servitude expressly stated. That will not help you, because, if there have been a large number of treaties saying that servitudes may be so accompanied, so far from that being a proof of custom, it is a proof against custom. It is proof that a stipulation is necessary, proof that you must have a deed, and cannot rely upon custom. Therefore, I ask them: Where have you proof?

Where have you thought of looking for it apparently? A  
 1018 single case of a nation voluntarily submitting to loss of sovereignty in the absence of a contract to that effect because it is a custom, because international law by custom attaches that as a con-



sequence to the mere establishment of a right? There is no such case.

So that even if the first part of their argument were right, if they succeeded in inducing this Tribunal to accept the fact that they could thus enlarge the contract by mere practice of States, outside the contract, they fail to do it.

I watched closely, of course, that side of the case of the United States which depends on the facts. I have analysed it so far as it depends on argument and principle, but when I come to that part of their case which depends on facts, on proof of particular instances, it does not exist. They have put in a few treaties, not very many, in which servitudes were established. That is to say, in which one State gained some right on the territory of another State. They have put in those cases, but they have thought it unnecessary to go further and say in that very case where no express term affected sovereignty or transferred sovereignty, that the State nevertheless submitted to have its sovereignty transferred because it is law. That is the way to prove international practice. They have never proved it, not in a single instance.

States may have parted with their sovereignty, as in the case to which Sir Charles was kind enough to call my attention in the Treaty of Paris. It was not a question of parting with sovereignty, because France was obtaining a cession of the Island of Miquelon, and, they may have been content to forego their sovereignty. But, they have never done it without knowing it—never.

Now, that is really the case the United States has got to establish against us.

Lord Bathurst did not know he was parting with English sovereignty. Lord Castlereagh did not know. Lord Castlereagh was a man who extended English sovereignty in directions which some people have since regretted. He certainly was not a man very willingly to forego the sovereign rights of England if he knew what he was doing. Not one of these statesmen can be said to have known that he was injuriously affecting the complete undivided sovereignty of Great Britain over any part of its territory.

JUDGE GRAY: Will you pardon me, Sir William. Do you understand that the position of the United States in regard to that branch of the argument which treats of servitudes,—to contend that there must have been by the grant of this liberty a transfer of sovereignty from Great Britain to the United States?

SIR W. ROBSON: Yes, Sir.

JUDGE GRAY: And that the United States have a right, you think they contend, to exercise a sovereignty in British territorial waters which theretofore could only have been exercised by Great Britain?

SIR W. ROBSON: I understand that. In fact, Mr. Turner put it very clearly. That is the footing. I am obliged to Mr. Justice Gray for making it clear. I will just make the references clear. Mr. Turner said, we claim participation, an equal participation, both by voice and hand in making and enforcing these regulations. I can read the references.

JUDGE GRAY: I do not wish to disturb you. I think you recall something of that kind to my mind.

SIR W. ROBSON: What Mr. Turner said was on p. 1975. There are several passages, but this is one of them:—

“A sovereign right to be exercised by the dominant state independently of the grantor, insofar as the servitude requires such action.”

JUDGE GRAY: Cannot that be understood as giving to the grantee, so to speak, the dominant State, the right—what is the language?

SIR W. ROBSON:

“A sovereign right to be exercised by the dominant state independently of the grantor, insofar as the servitude requires such action.”

JUDGE GRAY: The right of fishing which but for the grant they would not have had, and that is a necessary limitation of the British sovereignty, and negatives,—that is, the British nation could not, by virtue of its sovereignty exclude a fishing boat of an inhabitant of the United States from fishing within the prescribed waters, and therefore it gives up that much of its sovereignty. That, I understand, to have been the written position taken in the Case and Counter-Case. I am thinking of the Case and Counter-Case, and not the printed Argument.

SIR W. ROBSON: I think it goes a little further than that, though, in order quite to develop the full extent to which it goes, one has to look at one or two other parts of the Case. I quite agree, as Mr. Justice Gray says, that all these passages which are now interpreted as claiming a transfer of sovereignty, really might have been read in the first instance as merely claiming a limitation of sovereignty, because, as Mr. Justice Gray has put it there, that really amounts to restriction, rather than transfer. That is to say, that the servient State, having had a power to exclude all persons from its territory, has said to one particular State, we will not exclude your subjects. Now, that is a limitation upon the exercise of a sovereign right. Thereafter the servient State must not exercise its sovereign right so as to exclude those persons. But still, in my case, when they come there they are subject to all other sovereign rights of the servient State. That would be a mere limitation or restriction, in no sense a transfer of the right.

JUDGE GRAY: It is not a transfer of the sovereign right unless the right to fish is a sovereign right.



SIR W. ROBSON: Of course the right to fish is not a sovereign right. The right of exclusion is a sovereign right, and that right is limited, in fact *quoad* particular persons it is abandoned; I limit my sovereignty to the extent of saying I will not exclude you. That is a limitation, but of course that is not inconsistent with the full exercise of the local jurisdiction when the favoured alien has come in.

JUDGE GRAY: Then it becomes, in that view of it, confining yourself to what you have just said, a question of the extent of the limitation upon sovereign power?

SIR W. ROBSON: Yes. Of course every contract is a limitation, as I have so frequently said. I am not standing here to say that Great Britain has not subjected herself to any restriction or limitation. Of course she has. Every man who makes a bargain with respect to his future trade does that, but the difference between restriction and transfer is vital; under restriction, your favoured alien comes in, but he comes in like a subject, and he is subject to jurisdiction. That is what the United States never wanted. That is what they say they are fighting against. They want something more than mere restriction of sovereignty. They want to have it established that when a United States inhabitant comes in, not merely is the sovereign right of Great Britain restricted to the extent that it cannot put him out, but they say it cannot govern him when he is there in the exercise of his right. Of course it would govern him in regard to certain matters. He could not steal or do other things, which no inhabitant of the United States is likely to do. He must behave himself generally. The United States say, that will not do for us. When we have got him there, when you have, under the restriction attached to your sovereignty, allowed him to come in, we want him still to remain independent of your sovereignty, and not only that, but if there is any regulation required for him, it is the United States who are to exercise it; and further, we are going to decide what legislation may be necessary for him in the exercise of his right; not only that, but you have also given us the power legitimately to enter upon your territory by armed forces, and ourselves to control our own citizen, and not only control our own citizen, but to guard his right, which involves the control of your citizens. So that there has been there something much more than a restriction, there has been in that view a positive transfer of original sovereign authority from one government to another. That is the position of the United States. When they used language in their Case and in their Counter-Case they used a good deal of language which was ambiguous, which treated a limitation of sovereignty as though it were the same thing as a transfer. Continually they did that. But in any such cases I find it difficult to pick out passages which would quite suit my purposes, if I may

use the expression, because I cannot get their meaning very explicitly stated. There was no doubt about it, because the historical part of their Case showed that. They said they had a divided sovereignty. I refer, for instance, to p. 9 of their Case. They say there that they had equal rights as joint owners with Great Britain and the other colonies. They say that the treaty was merely a recognition of the division of those joint rights, like two partners. There is no question of superiority of status as between two partners when they divide the assets, and here, following the very phraseology and the very metaphors adopted by Mr. Turner, they say we simply divided the assets of a partnership. That was their partition of empire theory. There is no question there of one being servient to the other. Each of them took an original sovereign right by reason of their antecedent right, and he says we treated that as a division of the empire; our independence was no more a grant from Britain to us than the treaty was a grant from us of Canada, Nova Scotia, and so on; it was nothing more than a mutual acknowledgment of antecedent rights.

Well, then they say the same on p. 13 [United States Case]:—

“Great Britain has admitted that when this treaty was made she had no exclusive jurisdiction or right in such fisheries and that the United States as an independent nation would have been equally entitled to their use and enjoyment independently of any treaty provisions.”

Then, I turn to the Argument, p. 26. The passage I have just read appears to me a little more explicit and gets a little closer to what Great Britain parted with, namely, the sovereign right which the United States acquired. I quite agree with the construction that Mr. Justice Gray has put upon that passage. Again, taken by itself, it is possibly quite open to it, but when one has to choose between two meanings that are possible, when one looks at the context, it is that the printed Argument of the United States was indicating that the right which the United States had acquired was more than a restriction upon us; it was a conveyance to the United States of the full exercise of the right with which we had parted.

JUDGE GRAY: What you parted with was the right to fish, and if a right in the fishery was a sovereign right, unquestionably you transferred some sovereignty.

SIR W. ROBSON: If the United States were content with taking it in that way, I would not mind.

SIR CHARLES FITZPATRICK: Did you part with the right to fish, or convey the right to fish to some one else?

SIR W. ROBSON: No, we did not part with the right to fish; we consented not to exercise our sovereign right of exclusion against them for that purpose.



SIR CHARLES FITZPATRICK: Is not that the difference between the two? In the Case of the United States they speak of a limitation of sovereignty and in your Case you speak of a limitation of the exercise of sovereignty. In one case the sovereignty remains intact, under your theory, but the exercise is limited, while, under the other theory, the sovereignty does not remain intact. Then the question is what becomes of the portion which has been taken away from it.

SIR W. ROBSON: The United States say that they have got it, that they have got that which carries the right of regulation. If the passages in their Argument were confined to the construction suggested by Mr. Justice Gray it would be of no use to them because they want some construction of the right of fishing which carries with it the right of regulation and, in order to get that, they say, not merely that we have limited your sovereignty, but that we have got what you lost. For instance, they say that on p. 16 of the Argument. It is the italicised passage:—

*“the question at issue between the two Governments is as to what regulation of the freedom of the fishery in the matter of the time and manner of taking fish remains part of British sovereignty over waters within which exclusive sovereignty over the fishery has been parted with by Great Britain”*—

Not merely limited or restricted in its exercise, but parted with—  
 “by virtue of its grant to the United States of an equal right in the said fishery.”

They say: We are really made partners. We are partners with you and the grant is to be considered in the light of ancient history. We were originally co-owners with you, the grant continues the co-ownership and the co-ownership and dominion carry with them the right of regulation. They must get to that or else they cannot win this case. They must show that they have the right of regulation and until they show that they have the right of regulation they cannot be content because that construction that Mr. Justice  
 1021 Gray suggests might be put upon these passages. It would probably be the correct construction if it were left without anything further being done.

JUDGE GRAY: Your argument is with regard to one of the positions taken by the United States with regard to the construction of this right as a servitude. There is another branch of their argument which I hope you will consider and, no doubt, will do so, which confines itself to the extent of the limitation upon the scope of the sovereignty, as Lord Salisbury, I think, puts it somewhere. He says that there is a limitation upon the scope of the sovereignty of Great Britain in its territorial waters. The question then arises: What is the extent of the limitation upon the scope of the sovereignty?

SIR W. ROBSON: Yes, I shall say a few words with reference to that when I finish this part of my argument.

JUDGE GRAY: I do not want to interrupt you.

SIR W. ROBSON: Not at all; it is an assistance to me. I think that I will say as a few words upon the question of derogation from their grant and also upon the question of limitation concerning the transfer. Again, of course, I am bound to take the United States construction of its own claim, from the printed pleadings, which, though they are useful, do not bind the parties and which are generally adequately and much better interpreted by the parties themselves when they come to the oral argument. The oral argument puts the thing beyond any doubt. Mr. Turner, in answer to some observation of Mr. Justice Gray said, that the United States claim has gone to the extent, as I understand it, of the right even to execute any modality agreed upon. You see there is an exercise of sovereign rights, not a limitation of our rights, but the exercise of rights by the United States. Mr. Turner says, p. 1961 [p. 323 *supra*]:—

“And if the United States should find that any modality which it might agree upon, and which it might commit to Great Britain to execute, or which it might commit to the provincial authorities”——

There is the United States acting as governor and lord of Newfoundland—

“was being unfairly executed to the detriment of its own citizens, then it could insist upon as full a participation in the method of the enforcement of the regulations as that to be exercised by Great Britain herself. I say that that is predicated and predicable both upon reason and upon an almost unbroken line of authorities which I shall present to this Tribunal upon this question.”

Then Sir Charles Fitzpatrick says:—

“That is a necessary consequence of your argument in your case, is it”?

Mr. Turner accepts that. He is bound to accept that. Really, as I have said before, a mere limitation is of no use at all to the United States. They are obliged to go to the full extent and say: We have power to make regulations and; having made them, of course, in accord with our partner in sovereignty, we are just as much entitled as England itself is to see to their enforcement. When Sir Charles Fitzpatrick put that question to him: “That is a necessary consequence of your argument”?—meaning only that it was the logical point at issue, Mr. Turner said:—

“Why, sir, we do not shrink from that proposition at all. It is a necessary consequence of the argument, of course that if we have a sovereign right there which we are exercising in our own right”——



Not under anybody else's jurisdiction—

“and we find that that sovereign right is being disturbed and impaired by the mode in which regulations are being carried on, we may come in and say:—

“It shall not be done in this manner any longer. We propose to have our own voice and our own hand and our own participation not only in the making of these regulations but in their enforcement in these waters.’

“JUDGE GRAY: Would that be war?

“MR. TURNER: Well, it would be war if Great Britain should deny the right of the United States to do so.”

And so on.

1022 THE PRESIDENT: Is not this conception of Mr. Turner's, with reference to the littoral sea, expressed in the American contention, as it is set out in article 1 of the agreement itself, where it is said that regulations are not valid—

“unless their appropriateness, necessity, reasonableness, and fairness be determined by the United States and Great Britain by common accord and the United States concurs in their enforcement.”

If it is necessary to have the common accord of Great Britain and the United States, then the United States view is that the United States have an equal part in the making of these regulations with Great Britain, and that as Great Britain has the sovereignty, that therefore the United States must also have the sovereignty?

SIR W. ROBSON: Yes.

THE PRESIDENT: The same is the case with regard to concurring in the enforcement of the regulations, which is a vital part of sovereignty. If the concurrence of the United States is necessary to enforcement, the logical deduction and consequence would be that the United States shared in the sovereignty?

SIR W. ROBSON: I submit that is the true construction of that paragraph of the agreement submitted to the Tribunal. That was the contention of the United States. I say this in answer to Mr. Justice Gray's observation. There are a number of passages which, taken alone, of course, might lend themselves to a more restricted construction, but when you come to take them all together, and especially that passage to which the President has been kind enough to direct our attention setting forth the actual question submitted, there is no doubt whatever that the intention of the United States is to say: We are not content with a limitation or restriction; we demand a sovereignty of the same kind as your own, although it may be operative in a more restricted sphere. It may be in reference to territorial waters only and to a particular right, but still a sovereignty.

**THE PRESIDENT:** I would call your attention to the celebrated passage in Mr. Root's letter of the 13th June, 1906, p. 982 of the United States Case Appendix, which has been so often quoted:—

“It is conceded that this right is, and for ever must be, superior to any inconsistent exercise of sovereignty within that territory.”

This right, superior to the exercise of sovereignty, bears two constructions, does it not? It bears first the interpretation of a limitation, and it is perhaps reconcilable with the more comprehensive interpretation of a share in the sovereignty?

**SIR W. ROBSON:** Yes, but still there can be no doubt as to what the meaning of the United States is in the end, because it is asking for, and it must have, if it is to succeed, such a sovereignty as carries with it the right of regulation. It must have sovereignty for itself. It does not get that by the construction of the treaty, which only limits the exercise of our own sovereignty.

**SIR CHARLES FITZPATRICK:** The right of regulation involves necessarily the right of legislation?

**SIR W. ROBSON:** The right to legislate; so that it is demanding not merely the right to compel us to legislate in a particular way, but it is demanding the right to legislate itself and to enforce by executive acts that right of legislation.

**JUDGE GRAY:** I only want to suggest—and the suggestion comes from what has been said by the President—that if a right is clearly defined and admitted of one nation, or the inhabitants of one nation, in the territories of another, that right is in that sense superior to any exercise of sovereignty inconsistent with the right?

**SIR W. ROBSON:** Oh, certainly.

**JUDGE GRAY:** It is a limitation?

**SIR W. ROBSON:** Certainly. In other words, if I might put the observation of Mr. Justice Gray in the form of a legal proposition, Great Britain must do nothing that derogates from her  
1023 own grant, just exactly as a man, having made a contract, must act in relation to that contract so as not to interfere with the legal legitimate expectations of the other contracting party founded on the contract. He must keep his contract, and we must—in fact, it is a plain phrase that everybody would understand—keep our bargain. So, to say, in the more juristic phrase, we must not derogate from our grant. That is what Mr. Justice Gray points out as our obligation, and, of course, it is one that we have always admitted.

What, therefore, is the measure of our obligation? It is that, if we regulate, we must do it reasonably. To that extent we have limited our sovereignty. In the absence of obligation we are not bound to be reasonable at all. We might be as unreasonable in regu-



lating our own fishermen and other people's fishermen as we chose, but we have limited the exercise of our sovereign rights to the extent of promising that we will only regulate so as not to interrupt and impair the legitimate exercise of the right, whatever it is, that we have given. The question is: What is the right that we gave, and I think I have shown by the negotiations of the parties, by the contract itself and by the conduct of the parties after the contract and in relation to the contract, that the right given was the right to a regulated fishery and nothing else.

I have finished what I have to say as to custom. Now I would draw the attention of the Tribunal, and that very briefly, to the want of accord or unanimity between the different writers in relation to this concept of a servitude. I do not wonder that we should have a want of accord. It is extremely difficult for writers on international law to generalise and to collect principles from a number of treaties which are totally independent contracts, which are contracts made by laymen in reference to the particular necessities of the situation of the two contracting parties. They are not thinking about general principles. Each is deciding what it wants and how much it can get and they contract accordingly. It is not an easy task for the jurists to try and collect a general principle from the mass of individual, varying contracts. We could not expect very much accord, but we should expect accord if it is international law which is entitled to impose itself upon contracts. Then we should say, at all events, if it has got to the extent that it is a doctrine standing as a part of the international law, so that it is imposed upon a contract where not expressed, that we do expect it to be clear, certain and well defined. But, it obviously has no such characteristic and it would not be accepted if it had not become a part of international law. Jurists are speculating about it, they are only trying to introduce a little system, a new branch of international law, which is separate, detached, I might almost call it incoherent, because it depends upon a number of individual contracts from which no general principle can be collected.

For instance, Mr. Turner says that it will be difficult to get or expect harmony with reference to the extremely difficult conception of servitudes, that such harmony has not been found among writers and never will be found. I should have expected to have had him asserting that the writers were perfectly harmonious, absolutely clear and that nobody had any doubt about it, even going so far as to say that it was international law applicable to this present case. But, he does not say that.

Yet that is the doctrine which Mr. Turner himself describes as the doctrine which he claims to have been well settled and universally known in 1818, when these parties were acting upon it, or must have

been taken to have been acting upon it, because that is his suggestion. Mr. Clauss himself says that there is very little unanimity upon the subject, and that the subject has not received thorough consideration for about a century. That does seem an odd statement, because the subject has only existed in international law for about a century, and if it has not received thorough consideration during that time it has not received any consideration at all, as I shall show. It had not emerged from its German home—it had not come out from its German birthplace—until the end of the eighteenth century, if even then. Certainly diplomatists have not done much to develop the concept; they never used the word. They kept clear of it most carefully. Even in recent times, when Colombia has some reason to fear that there is a servitude in the air, it takes care to have it known that it is not going to have any such doctrine of servitude applied in its case. Diplomatists avoid the word because it is a word which connotes and imports disagreeable and humiliating associations to the State. I think it has been mentioned in the course of these proceedings that Bismarck, when some question was raised with regard to razing fortifications upon the German boundary, objected to treating that as anything like an adequate protection to Germany. He said: “It constitutes a servitude, and I prefer annexation, about which there can be no doubt, because the application of that character of servitude was a thing which created continual friction and doubt as to the relations of the two parties.” In fact, the

word “servitude,” as I ventured to say at an earlier stage, was  
 1024 bad nomenclature. Whatever meaning you may give the word, whatever significance you may attach to the thing, it is the most unfortunate thing, I think, that ever found its way into international law at all. As to private law, I do not think there is any harm in it. There is no humiliation to the owner of a property if his land is burdened for the benefit of adjacent land. After all, if there is any doubt about enforcing the rights attaching to such a servitude there is the common law of their common country to decide between them. A servitude attaching to a man’s land in no way humiliates him. It does not affect his personal status, and if there is a doubt about it there is the judge, who will settle it. He is sovereign over both the dominant and servient property. But if you transfer this inappropriate conception to international law, at once it begins to work mischief and confusion, because the States that are said, one to be servient and the other to be dominant, have no judge above them to settle their rights. The servitude attaches not to their territory. It is said to attach to their territory, but it attaches also to their Government, according to the view contended for now, and becomes instantly important, affecting the territorial status—that is to say, the status of the State. It affects the national pride—it touches the



national patriotism. I say that the word—it is only the word that I am complaining of here—is a word extraordinarily ill-adapted for international relations, but very well adapted for the relations of private property, because property knows no humiliation. You can put as many insulting names as you like on a meadow, and the meadow will go on producing its fruits, whatever they are, irrespective of the name you ascribe to it; but if you attempt to put names of that kind upon a person it is useless to tell him that they mean nothing—that they are only legal terms. He does not like the name; and if, instead of putting it on a person, you put it on a State, then you excite—and naturally excite—most just alarm. No State valuing its independence, and treating regard for independence as a supreme civic virtue, because that is what patriotism is, will consent to any right belonging to a name so dangerous—dangerous to its interests and offensive to its pride; and therefore I submit to this Tribunal, which is now called upon as representatives of international law to deal with this concept, that the Tribunal would do well, not merely to mark out carefully the limitations of such a conception, but to discourage the application of the name to treaty obligations, which ought to be fostered and extended; because when I pass from the name to the thing, then I recognise how useful it is, how desirable it is, that every State should submit to that which is here called a servitude; how well it is that nations should open their gates—that they should allow citizens of foreign States to exercise rights over their territory; not a thing to discourage by a name importing every kind of national offence, but a thing to be encouraged; and I think it is well that obligations of a territorial class should be classed among the ordinary contractual obligations, because that would deprive them of their offensive association and encourage their increase and spread. There is a tendency, happily growing, on the part of States now, in the extension of economic relations between them, to give rights to each other. But let them give these rights to each other free of all doubt or fear as to the consequences in international law, and the further consequences upon their national independence and national pride. So I think it is a bad name.

Now, let us look at what its definition is supposed to be.

**THE PRESIDENT:** Was there any use made of the term and the concept of international servitude in the public law of England and by the English writers of international law about 1818 or before 1818?

**SIR W. ROBSON:** None whatever; absolutely none. If I may postpone my observation for a few minutes, I have a separate part of my note dealing with that. There was none at all. We have never talked of servitudes. In our private law we talk of easements.

**THE PRESIDENT:** What is the difference between an easement and a servitude, considered from the other side?

SIR W. ROBSON: Of course, the phraseology would be to say that the owner of a servitude has an easement; we do not say that; we do not say that on one side you have an easement and on the other a servitude. We apply the same word, "easement," to both sides of the right.

THE PRESIDENT: Then the starting point is the *prædium dominans* instead of the *prædium serviens*?

1025 SIR W. ROBSON: Yes. What we say is that where one person enjoys an easement the other person suffers an easement.

SIR CHARLES FITZPATRICK: But a servitude is related to property. Property is under a servitude and a person is under an easement?

SIR W. ROBSON: Yes, though when you are dealing with property you say that one is subject to an easement and the other is entitled to an easement. That is merely in relation to private law. But, in so far as international law is concerned, I do not know of any case where an English writer—I may not be correct here—in 1818, or prior to 1818, ever talked of such a thing as a servitude. I do not know that the name occurs in connection with English law in 1818. I think I shall show that it does not, but, of course, one speaks with a little doubt where the range of investigation is so vast. I have given in the last few weeks great attention to all the writers I could discover and have had time to read on this subject and I think I am safe in saying that up to 1818 nobody, outside of Germany, with two possible exceptions, that I think I can explain, ever treated a servitude as being a part of international law at all.

I will deal with the authors in groups. I have considered how to get up this part of my case as briefly as I could. Mr. Turner was compelled to take five or six days to it. I am afraid I shall not be able to finish this afternoon, but I shall finish in a very short time by dealing with the different authors in groups and showing how they affect each of the material questions.

SIR CHARLES FITZPATRICK: Going back to the question of an easement, does an easement convey any title in a property subject to easement?

SIR W. ROBSON: No, there is no connection with ownership.

SIR CHARLES FITZPATRICK: Is not that the essential difference?

SIR W. ROBSON: Yes. There is no connection with ownership at all. I was referring to an easement on the mere question of nomenclature; I was not referring to the characteristics of an easement. While you might speak of the easement of the dominant and servient parties, we do not want the word "servient"—

JUDGE GRAY: There might be an easement attached to a property in favour of the abutting property?

SIR W. ROBSON: Certainly. Now, let me come to the question of what is a servitude and then I think I will come to the point raised



by the President as to the historic origin of the term if I find I am able to do it in the time at my disposal. The prædial servitude, of course, goes back to the Roman law and there it was admittedly a right over land—over one prædium or piece of land in respect of another prædium or piece of land. These prædial servitudes are enumerated exhaustively by different writers on Roman law and I expected to hear Mr. Turner point to some passage that I have not been able to discover in which a *jus piscandi*—a right of fishing—is enumerated among the possible servitudes. I cannot find it so enumerated; so that, to take the United States argument at its very inception, in the Roman law, the liberty of fishing upon another man's land was never treated as a prædial servitude at all. The character of the rights was well known. You have rights of way, *usufructus*, *usus*, *habitatio*, and *operæ servorum*. All these rights were strictly in relation to the enjoyment of a piece of land.

DR. DRAGO: In Roman law there is what is known as a personal servitude?

SIR W. ROBSON: Yes.

DR. DRAGO: That is a servitude created for the benefit of a person and relating to real estate—*usufructus* or *habitatio*.

SIR W. ROBSON: You have the right of *usufructus*, *habitatio*, and various other rights of the kind which constituted personal servitudes. You have the usufruct of land and under it the usufructuary enjoys the fruits of the land. It is something like what we call a lease in English law. The thing was committed to the usufructory and he was bound to hand it back as he had received it, but in the meantime he had all its fruits and advantages.

DR. DRAGO: It was for the life of the person.

1026 SIR W. ROBSON: For the life of the person. In such a case as that the right of fishing would go with the usufruct, the prædium. The usufructuary would enjoy the right of fishing. That, of course, is not a question of servitude, except of personal servitude.

I think the nearest parallel that could be found in Roman law would be probably to treat the right of fishing as a *usus*—a usuary rather than a usufructuary right; but in no case is it a prædial servitude; because a prædial servitude exists solely and entirely for the benefit of the adjacent property, and the property alone; and it was very necessary to confine the scope of a prædial servitude to the needs of the adjoining prædium, because otherwise you had no limits to it at all. The measure of the servitude was to be found in the needs of the dominant tenement.

THE PRESIDENT: But if it be considered as a *usus*, there would also be some measure, of course. Where would be the measure in the case of its being considered as a *usus*?

DR. DRAGO: The *usufructus* is the right to take the produce of the land; and the *usus* is the right to use the thing, but not the produce—not to take the produce. That is the difference between the *usufructus* and the *usus*.

THE PRESIDENT: And the *usus* would also be limited for a lifetime?

SIR W. ROBSON: Yes; limited for life. And there again, in the case of the *usus*—I am speaking with a little diffidence, because I know I am addressing those who administer the Roman law, whereas it is a system of law very foreign indeed to our English system—but with regard to the *usus*, as I understand it, the usuary could only take such of the profits as might be necessary for his own enjoyment, and it was for his own life. I only mention *usufruct* and *usus* in order to clear the matter away as far as prædial servitudes are concerned. Neither of them was a prædial servitude. Neither of them was permanent. For instance, the usufructuary could not enjoy the usufruct beyond his life. You could have a usufruct vested in a corporate body, or that which was analogous to a corporate body, but even then the Roman law put a limitation upon it—I think it was a hundred years.

DR. DRAGO: Yes, that is it; a hundred years.

SIR W. ROBSON: Or some limitation of that character, in order to put a termination to the right. Of course the prædial servitude was different. The prædial servitude, to use an expression familiar to us in the English law, “ran with the land.”

DR. DRAGO: The usufruct in the case you mentioned a moment ago was limited to a hundred years, unless there was a convention.

SIR W. ROBSON: Yes; unless there was a convention.

DR. DRAGO: To extend it.

SIR W. ROBSON: Unless there was a convention extending that period. But now these personal servitudes, as I might call them—*usus fructus*, *usus*, *habitatio*, *operæ servorum*—these are personal servitudes, not prædial at all; and nobody has attempted to confuse international law by the introduction of personal servitudes—no one. Take, for instance, the right of *habitatio*. You had a right to live in another man’s house, and it really was only tenancy; or *operæ servorum* where you had a right to the labour of a slave. These were all relating to the benefits to persons. I am using a phraseology perhaps more appropriate to my own law. They are all personal and not prædial servitudes. You may find a right of fishing among personal servitudes, but you do not find a right of fishing, so far as I know, among prædial servitudes. I do not think anybody would suggest that any such right exists.

Rivers and seas were included, in the Roman law, in the class of *res communes* or *res publicæ*—public or common things, things be-



longing to the commonalty, or to the public; and they were incapable of having servitudes imposed upon them at all.

Of course, as I have said, the usufructuary of an estate could take fish; but there is, I venture to submit, no case of a right to fish being treated in Roman law as a prædial servitude; because there is no *prædium dominans*. It may be that the owner of one property has a right to fish in the property of his neighbour; but that is a right to him, the owner. It is not a right necessary for the needs of his property. The other rights, the rights of way, the rights of drawing water, or of allowing water to run, are rights necessary for the adjoining property. That is why they attach to the *prædium dominans*, and you must, for the enjoyment of such a right, have a *prædium dominans*. Then you have your prædial servitude. But fishing is not necessary to the adjoining property. The owner of the adjoining property can enjoy his land perfectly well without fishing on the land of his neighbour. It is a personal benefit, or a personal amusement; but it is not a right which attaches to a prædium, at all. It may be that the right is given to the owner of the property living in a particular place, as for instance, the right may be given to the owner of an adjoining property called the United States, but it is not given to him in respect of his territory. It is not given to him because it is necessary for the full enjoyment of his territory. The owner of the property, or the inhabitant of the place can get on quite well without fishing, and enjoy his property to the full without having any right to fish in the lake of his neighbour. So that, when one takes this claim, put forward here as if it really needed no demonstration at all, one sees that at the very beginning of things, even if the law of servitudes had the ancient foundations which it is claimed to possess, and were well known and universally accepted, it does not apply to fishing rights. It can only apply to matters which directly affect the territory of each. Even if you get it into international law, even if you do apply it in that inappropriate sphere, it still must be confined, as it was confined in private property, strictly to territorial needs, to the needs of the land. Mr. Turner was asked several times: "What is your *prædium dominans*?" Now, that troubled him; and small blame to him. It was very difficult for him to find out what was his *prædium dominans*. He was asked by the President what his *prædium dominans* was, and in reply, first of all, he said (p. 1826 [p. 299 *supra*]):—

"I consider the territory of the United States to be the *prædium dominans*."

That got him into difficulties. The President said:—

"In 1783 there were thirteen States in the Union. Was it then created for the benefit of these thirteen States in 1783?"

Mr. Turner says:—

“I should say so, Sir.”

Then the President says:—

“And in 1818 there were how many States? Were there only these ancient thirteen States, or were there more?”

Mr. Turner goes on say there were more. I think there were no more in 1818 than in 1812; but there very soon began to be many more. So that, really, was fatal to the prædiality of his servitude; because there was no limit. There is no measure to the burden upon a territory, except by the needs of the other territory that enjoys the servitude. But if you may add indefinitely to the other territory, if you may double it, and treble it, and quadruple it, you are then adding to the burden of the servient territory to an extent which is unendurable, and could never have been intended.

Well, Mr. Turner felt that difficulty; and he took time to consider. He said, on p. 1829 of the record [p. 300 *supra*], a little later, that the United States exercised the right in respect of the original thirteen States. That was his next step.

That, however, he felt he had better be careful about; because, how are you to distinguish between the thirteen States and the subsequent forty-five States—I believe there are more still, now? Is everybody to be warned that he must not fish in Newfoundland unless he lives in New England, or in one of the original thirteen States? That could not have been intended, and Mr. Turner did not like that. So, I think then it was at p. 1829 [p. 300 *supra*] he said:—

“I assume the servitude right would not be enlarged by the fact that the separate colonies which individually had a right to this servitude, formed themselves into a Union, but that the composite Government which they had thereby formed, exercised identically the same right for identically the same territory.”

That was how he tried to get over the difficulty put to him, that he was enlarging the burden upon the servitude territory. “Oh, no,” he said, “it is the same burden. The government is enlarged, but it can only exercise its right in respect of the original territory.” Well, that was to be considered, and it was considered, and then, on 1028 p. 2130 [p. 351 *supra*], Mr. Turner comes back with the considered reply of the United States to that difficulty. And he says:—

“I point out also that the *prædium dominans* here is not some particular part of the United States which may have been a part of its territories at the time of the grant of 1818; that *prædium dominans* is the sovereignty of the United States in its relation to its territory generally. Now, that may not be a very perfect conception, I do not say that it is, but that is the conception upon which the institution is treated in international law at the present day, and the position



of the United States is that it is the practice of nations which constitutes the validity of this institution in international law, rather than the perfection of the analogies which may be drawn between the institution and the servitudes of the Roman law."

I think there was another passage also; yes, at p. 2156 [p. 356 *supra*], in which Mr. Turner went a step farther; and I think that step took him over the precipice altogether. He was dealing, in the intervening pages, with the argument, and the Tribunal was trying rather to get some concise statement of his point. And Mr. Justice Gray said:—

"I think I understand your contention, in so far as this author supports it"—

They were talking of some particular author; it does not matter which one—

"to be that there has grown up in international law, a right, or a legal relation, which is conveniently called an international servitude by analogy to the civil law servitude although not perfectly analogous. It is *sui generis*. It is a limitation of sovereignty in its own territory, not for the benefit of another *prædium*, but of another sovereignty."

These are the words to which I draw attention:—

"not for the benefit of another *prædium*, but of another sovereignty."

Now, says his Honour, Judge Gray:—

"That is the doctrine, as I understand it, that you put forward?"

And it was, if I may say so, a correct statement of Mr. Turner's view; and I read that because it is rather more compendiously stated than it is on the preceding pages by Mr. Turner. Mr. Turner says:—

"That is the doctrine that I am going to endeavor to establish by this reading upon which I have now entered."

What is the meaning of that? "Not for the benefit of another *prædium*, but of another sovereignty." So that the *prædial* element is gone. It is not one *prædium* serving another *prædium*; one territory serving the uses of another territory. That was Mr. Turner's definition; the Tribunal will remember that was the third feature in his definition of a servitude: That it must be a case where one territory serves the uses of another territory. It is that no longer. Driven by his argument, Mr. Turner has to give up the dominant *prædium*, to let it go, and in its place put a sovereignty. In other words, it ceased to be a *prædial* servitude at all, and it becomes a personal servitude, but a personal servitude vested in a corporate body, not capable according to Roman law of holding such a servitude beyond a definite time. So that it is no longer a *prædial* servitude.

Now, just let us remember what his definition was of what a servitude must be. If the Tribunal will remember, it must, he said,

belong to a nation. It must be permanent, and it must be one territory made to serve the purposes of another territory. As to the first of those three parts of his definition, I need say nothing. I contend that it does not belong to a nation. It simply applies to the persons who may exercise it, having made a contract in relation to their benefit.

With regard to the third, that it must be one territory serving the uses of another, that is gone, because it is not a territory serving any use at all; or rather it is a territory serving a use, not, however, the use of another territory, but of a Sovereign.

And now, with regard to the third factor in the definition, that it must be permanent. One would think there, at all events, one was on safe ground. I could not quite find out where he got, except by implication, his statement that it must be permanent; because one or two writers speak of temporary servitudes. So I turned to the United States Argument, and turning to the United States Argument I do get some light on the subject; but it is an illusive light, which increases my difficulties. For instance, let us see about the permanence of the servitude. We have two cases in two treaties,

1854 and 1871, where this liberty was granted for a definite 1029 and limited time. In one case I think it was for twelve years; it does not matter what the other case was. Now, I wondered, in looking for the United States definition of servitude, whether they would regard these two temporary liberties as being servitudes. Because, if they are, then Mr. Turner must reform his definition, and knock out the reference to permanence.

Well, the United States Argument decides the matter for us, because on p. 57 of the Argument, it says:—

“With reference to the first article of the reciprocity treaty of 1854 between the United States and Great Britain, printed in the British Case, the United States takes the position that by that article”——

That was the fishing article, the article relating to fishing rights—  
“a mutual servitude was created,”

To anyone in search of light on the definition, that rather increases the darkness. Then, on p. 59, there is a paragraph:—

“It is interesting in view of the present controversy, and it also throws light on the meaning of article 27 of the Treaty of 1871,”——

Article 27 was, I think, the article relating to the freedom of Lake Michigan—

“to note the care observed by the two nations in safeguarding national sovereignty when dealing with the rights granted respectively by articles 26 and 28 of the same treaty.”

Article 26 deals with the navigation of the River St. Lawrence, and says it shall remain free and open forever to the commerce of



citizens of the United States, subject to laws and regulations of Great Britain or Canada. Then Article 27 is:—

“The Government of Her Britannic Majesty engages to urge upon the Government of the Dominion of Canada to secure to the citizens of the United States the use of the Welland, St. Lawrence, and other canals in the Dominion on terms of equality with the inhabitants of the Dominion, and the Government of the United States engages that the subjects of Her Britannic Majesty shall enjoy the use of the St. Clair Flats canal on terms of equality with the inhabitants of the United States, and further engages to urge upon the State Governments to secure to the subjects of Her Britannic Majesty the use of the several State canals connected with the navigation of the lakes or rivers traversed by or contiguous to the boundary-line between the possessions of the high contracting parties, on terms of equality with the inhabitants of the United States.” [British Case Appendix, p. 41.]

And then Article 28:—

“The navigation of Lake Michigan shall also, for the term of years mentioned in Article XXXIII of this treaty”—

Ten years—

“be free and open for the purposes of commerce,”

There you have three temporary liberties, that is, temporary because the treaty was temporary, analogous to this liberty. Are these servitudes or not? I find on p. 59 of the United States Argument:—

“These two articles secured to each country the free navigation of certain rivers and lakes within the territories of the other, creating undeniable servitudes in favor of each country as against the other.”

So what are we to take servitudes to be? The three elements of the definition with which Mr. Turner gaily started out he finds cannot be kept to the end. The prædiality is gone. That he says was in the third factor of his definition. And the permanence is gone; that was in the second element of his definition. And as to the first, that it must belong to a State,—well, anybody can judge that for himself. A State cannot fish. It is only its inhabitants that can fish. So that, really, there is nothing left of his definition. And yet we are asked to accept the doctrine that servitudes were so well known and so universally understood that even a well-informed man like Lord Bathurst, and a learned and ingenious jurist like Lord Castlereagh, together with a busy patriot like Mr. Adams, and a great politician like Mr. Monroe must be supposed to have known all about it.

1030 I think I am now able to pass to the historic part of the case, where these servitudes come from, how they got into international law, to its confusion and its detriment.

As we know, in going through this long list of authorities, in Grotius, the father of international law, the word “servitude” is not to be found. He is writing in the latter part of the seventeenth

century. And it is not to be found, either, in Vattel. It is not until we get to the author Vitriarius, who, I think, writes in 1686, that the word appears at all, in relation to public rights, or, I should rather say, in relation to the rights of public bodies. It was purely an expression current among those who are concerned with municipal law. Vitriarius uses it, but he uses it of course really and strictly in reference to German constitutional law.

One must be most careful how one applies expressions, which really work quite conveniently as between German mediatised States, to international relations. The Germans were able easily to deal with servitudes founded upon notions of property, notions of dominium as opposed to *imperium*, because they kept their feudal conceptions in their public law, I think, somewhat longer than other States. And they might quite naturally talk of one mediatised State being servient to another mediatised State. And it will be found that all the early writers, down to 1818—with just two possible exceptions—who wrote about servitudes, and whose books were laid before this Tribunal, are all writing about German law—not international law at all. Expressions are taken by Mr. Turner, printed for the benefit of the Tribunal, with relation to servitudes as these writers are dealing with them. But when one comes to classify these writers in order of date—as, after all, dates are everything here, when you are construing a treaty in 1818—we find that all the expressions they used, all the principles they laid down, have no relation at all to European law, but purely and simply to the relations of subordinate States with a somewhat imperfect sovereignty.

The first of them, still a German, who is said by Mr. Clauss to have divested the concept of its garment of private law, and to introduce it into the domain of public law was Engelbrecht. He wrote in 1739. But the public law into the domains of which he introduced this term was still strictly German. For instance, he is dealing with well-known rights, very necessary among German States, of the passage through territory, through foreign States and rivers, to enter other ports, and so on; but that he is dealing with it as a German matter is shown by his saying that the court of competent jurisdiction for deciding disputes in relation to servitudes—there are two such courts: One the Imperial Chamber, and the other the Imperial Council. So that Engelbrecht must be treated as not touching international law. It cannot be supposed that the diplomatists of Europe in making their treaties, were concerned to know anything about the law of German States, as between themselves.

I shall try to take these authors in groups, because I could not ask the Tribunal to go again through them *seriatim*; and I think I shall be able to deal with them shortly. I take some others of the authors mentioned and very well dealt with by Mr. Clauss:—



Rutter, who wrote in 1754 and 1770; Majer, who wrote in 1775 and 1776; and Römer, who wrote in 1789—all of them writing of German State law, but all treated by the United States as though they were really authorities upon European international law. They are nothing of the kind. And Mr. Clauss is conscious of that. He goes on to give us an account of Schmidt, who writes in 1764. I shall trace all the authors that have been cited up to 1818. Schmidt, in 1764, another German author, has something very strong to say about the word "servitude." He does not like it. He thinks that even as between the German States it is wholly inappropriate to introduce it because it touches sovereignty and he thought, as the Tribunal have suggested this morning, that it was a somewhat risky thing to apply this concept to sovereignty; that is to say, to government instead of to property, to which it belongs.

He said it:

"has . . . . been incorrectly transplanted from private into public law . . . . for he who conceives a faithful notion of servitude in private law and applies it to jurisdiction competent in alien territory is led into error. . . . servitude should be considered only as a limitation of property; . . . the rights which belong to the supreme government of the territory . . . cannot be separated from sovereignty and possessed by another person."

There was good sound principle. He goes on:—

"This supreme government of a territory . . . brings it about that the prerogatives which the ruler of the land exercises in foreign territory are always subjected to the supervision and control of the person possessing the territorial sovereignty . . . in that territory."

1031 So that here you have a German author in 1764, still speaking only of German constitutional law, and not of international law, and he says, even in that limited sphere, remember that the servient State is nevertheless in point of jurisdiction the governing State; and the servitude itself is to be exercised subject to that local jurisdiction—negating in explicit terms the proposition of Mr. Turner.

Then take the next authors. They are of much later date, but I have K. A. Zacharia, because he appears early and lasts a long time. He is writing in 1769, and writing again, with undiminished vitality, in 1843. And he says:—

"State servitudes are contractual obligations and are to be judged as such by the principles in force among nations in general in regard to agreements."

Now comes Gönner, who appears to be, from the way in which other writers speak of him, regarded as a very distinguished authority; but he also is writing on German constitutional law, and that only. He is writing in 1800; and he says:—

"If the territorial ruler in whose territory a certain state servitude is exercised possesses undiminished all sovereign rights with which the exercise of a state servitude is compatible, then the right of supervision is the one which can be least taken away from him, for without this essential sovereign right, the ruler cannot know what is taking place in the state; he can neither prevent impending damage to the state nor promote the advantage of his state."

There is an admirable principle. Gönner says:

"If you infringe the sovereignty of a State, see what you are doing. If you allow an alien to come into a territory, and there exercise, as of his own authority, rights of jurisdiction, the proper Governor of the State does not know what is happening. He does not know what the other alien sovereign may be doing on his own account. He has not got him under his control. He cannot prevent damage. He may not be able to punish him."

And so he gives that as a reason why the servitude right must always be strictly subject to the local jurisdiction. That is one of Mr. Turner's authorities which, as I say, I submit, like the others, tell against him, when they come to be carefully examined.

Then Dresch, who writes in 1808, denies the possibility of a State servitude with reference to sovereign rights, altogether. He confines such rights to property rights. Mr. Clauss makes him say (I can give the references to Mr. Clauss, in which he deals with these authors):—

"Every agreement entered upon by a republic or monarchy the purport of which is a limitation of the rights of government can only be of temporary duration."

That does not seem very much to favour that part of the definition which Mr. Turner gave in regard to permanence. Dresch says that in his opinion any limitation on the Government's power is invalid. And it is rather interesting to note that Mr. Dresch refers to the French fishing right, which then existed under the Treaty of Utrecht, and he says it is a servitude. But why is it a servitude? He gives the reason: because he regards it as a mere property right, not as a limitation on sovereignty. When he comes to deal with the servitude as to the fortifications of Dunkirk, one of the very familiar instances that runs all through the authorities, he considers it altogether invalid, because it touches rights of sovereignty. So here we have got to the year 1800, and so far, of these authors that I have mentioned, not a single one allows that a servitude right can touch sovereignty. Of course, if there is an agreement that it shall touch sovereignty, that is a different thing.

I now take a group of authors that came next:—

Saalfeld, who writes in 1809 and 1833, and Schmalz, who writes in 1817, and Schmelzing, who writes in 1819. Saalfeld and Schmalz simply describe servitudes in general. They do not say anything



that is very material either one way or the other. Schmelzing calls international servitudes:—

“Such one-sided services, permissions, or abstentions to which one state binds itself towards another without impairing its internal or external sovereignty,”

A very important qualification—

“without prejudice to its possessions or domain, or its jural political personality in general.”

Here I am at the date of 1819; and so far every one of these authorities that I have examined, and which Mr. Turner puts forward, is in my favour. But Mr. Turner puts them forward because they deal with the institution of servitudes, and talk of servitudes; and 1032 he says this shows that the institution was in existence; that people knew about it. It was in existence in Germany. But the concept was a stranger in European law. There are two writers, and two only, up to this date, among the authorities that I mentioned—because I am not dealing with others—Wolf and Von Martens, whom I cannot class as writers solely on German constitutional law. I have an imperfect acquaintance with their works, as I have not been able, in the time at my disposal, to give adequate examination to, or obtain complete information upon, these writers. Wolf refers to territorial servitudes, and he says that they do not demand any special treatment, and that the principles of the servitudes of private law may be analogously applied—a very fallacious principle. Also, I think, he deals with the case of a servitude which clearly is not German. I do not know where he gets it from. He gives us an instance where one nation takes possession of an unoccupied territory, and then leaves it, and another nation comes and takes possession of that unoccupied territory; then whatever property the first nation may have left behind it, or whatever rights it may claim still to enjoy by virtue of its antecedent sovereignty, they must be treated as a servitude as against the second nation. I cannot imagine any such case happening. I do not know of any cases where nations took the trouble to conquer States and then leave them, with perhaps some unconsidered articles behind them. It is an impracticable case, and I do not see how any principle of servitudes could apply to it.

Then, Von Martens speaks of servitudes, but he does not deal with them from the point of view from which I am examining them, namely, their immediate effect upon sovereignty, apart from agreement.

Those are all the authorities that this Tribunal has had down to 1818; all of them. And I do not know of one, with the possible exception, as I say, of Martens, of whom I speak with diffidence, because I am not thoroughly acquainted with his work, or Wolf. I

only know their works from what Mr. Clauss says about them. But there is not one of them that supports the proposition of the United States.

So that, in 1818, there was no obligation on these diplomatists to know anything at all about servitudes. It was purely a question for that great group of states, having such very intricate relations among themselves, that went to form the great German nation—if one may use that term of that race at that time; it had no bearing and no interest in relation to international law.

That is really conclusive. It is conclusive against the United States contention. They have treated a number of writers who speak of servitudes as establishing that the doctrine existed at that time; and having established, as they think, that the doctrine existed at that time, they have left it there. I say they have left it, and have gone on to assume that they might attach to that doctrine at that time all these consequences, some of which are hinted at, or expressed, or advocated by writers at a later date. Writers of later date will not do. It is writers of the date up to that time alone who are admissible authorities to establish their contention. And when those writers come to be examined in detail, and classified according to their views, it is seen that none of them supports the United States view.

Later on, no doubt, some writers did give a much wider scope to the doctrine. I am really not concerned to deal with those writers. I am in a position to deal with the variations that all of them show in regard to their views on servitudes, but it is really quite unimportant. What matters to us anything after 1818? Because it is the construction of this contract, this treaty which has been laid before this Tribunal. When one comes, therefore, to look at the whole of this doctrine of servitudes, how inappropriate it is. In the case of the particular contract under review, it really has no application at all; because it came into existence substantially so far as international law is concerned, after this contract altogether. And it has since pursued a very devious and uncertain course. It has rested upon an unreal distinction, an undesirable distinction so far as juristic purposes are concerned, a distinction between territorial and national sovereignty. These authors do not generally ask themselves what sovereignty means. And it is very striking with regard to Mr. Clauss, whose book has played so large a part in this enquiry. He does not profess to have given much study to the concept of sovereignty.

One cannot help making some observation about the way in which Mr. Clauss is laid before this Tribunal as an authority. His industry has been admirable. As a compendium of what previous writers have said on this subject, the work of Mr. Clauss displays



merit and commands approval. But I respectfully protest against such an author being laid before this great Tribunal as an authority whose opinion should of itself carry weight. We have a rule in English law which may seem a little artificial, but which works well. Our Judges will not allow us to cite text-writers and writers of books unless they are dead. Well, if we were to apply that  
1033 test to all the authorities that have taken up so much of the time of this Tribunal, we would either have cut down the argument very much or have massacred many very eminent and learned individuals; because they have carried these authorities right down to 1910. I think that was the latest date at which some of them were published.

Well, I think that we ought really to display some care in putting before the Tribunal works of this kind as authorities.

Look, for instance, to what Mr. Clauss says about himself. He says in his preface, first of all, that the doctrine of servitudes has been rather neglected this century, that is, the last 100 years. Well, it has. As I say, it did not come into existence as international law until about a century ago, so that it has had a very neglected life. Then he goes on to say that this subject seemed a very suitable one for the theme of a prize essay. It was not that Mr. Clauss, as some distinguished jurist, was impelled by his study and learning to communicate his knowledge to the world at large, but he selected this subject as he might have many others, for a prize essay. Then he went on say that he thought he would use it to obtain his doctor's degree. Then he says, the author encountered great difficulty (p. 2 of his preface) in the determination of the concept of State sovereignty. Well, gentlemen, who write prize essays for their doctor's degree want the prize and the doctor's degree. They do not trouble much about collateral matters like State sovereignty, and he says that, in his opinion, the entire foundation of the doctrine is State sovereignty; but he, the author, as a beginner in political science, considers he ought to leave it to more competent hands, and so on.

While I have the greatest respect for Mr. Clauss, and I would not say a word other than complimentary of him, I must say that the prize essay of a beginner in political science, who knows nothing or very little about the concepts of State sovereignty, is scarcely the kind of work to put before this Tribunal as an authority. As a compendium of other writers he has done very good service. I see he winds up his preface with a very proper expression of thanks to his highly esteemed teacher, who was a professor in some university. However, that, as I say, does not entitle Mr. Clauss to much weight. He might well have examined this concept of sovereignty a little more closely. He does not even ask himself what sovereignty is. Far be from me to give anything like a scientific or comprehensive

definition of sovereignty. We look at sovereignty as you may define it from several points of view. But, however you define sovereignty, according to lawyers' conceptions of it, you cannot give an adequate or proper definition without excluding this distinction between territorial and general sovereignty.

Sovereignty is the supreme governing power vested in some defined person or persons over all persons and things within the limit or under the control of a State. That is the modern view of sovereignty.

Nothing is gained by seeking to distinguish between that sovereignty, thus widely defined, and what is called "territorial sovereignty."

The sovereignty, I would not say so much of a State, even that is a little ambiguous expression, but the sovereignty under which States are placed is just the same in respect of ships as it is in respect of land. It may have some degree of ancient ownership rights in land, but they are really not material to an enquiry of this kind touching international law.

And, I venture to say, not only that the word "servitude" is inappropriate, but the distinction between territorial and national sovereignty is a somewhat risky distinction. It does not correspond to anything real in the sphere of life with which we are dealing. The State has just the same control over its land as it has over any other class of article, or goods, so far as the expression "national sovereignty" is concerned. It is an obsolete conception that the State, as *dominus terræ*, may create obligations with regard to its territory which confer upon other States rights which do not attach to the ordinary treaty obligations of a State. That distinction has not been in international law a fertile or a fruitful distinction. I think on the whole it has rather tended to create confusion.

Well, I ask the Tribunal now to remember the propositions which I said the United States must make good in order to establish this doctrine of servitude.

The first proposition, it may be remembered, was: They must show that it was a doctrine well understood, universally understood, at the time of the treaty.

I think I am now in a position to say that at the time of the treaty it was a doctrine which was practically unknown in international law. The international chicken, if I may use the expression, had not emerged from the German shell until much later. Therefore they have not established that proposition.

The next was, that such servitudes brought about not merely a restriction of sovereignty, but a partition or transfer thereof.

1034 I have now gone through the authorities. None of them up to 1818 established any such principle. Few of them indeed



afterwards. But, I do not care whether they do or not later; therefore, I have not troubled to deal with them at all.

Then the third: That this is the incident or the consequence of a servitude. That is, this effect on sovereignty was so well known and understood at the date of the treaty that it would at that time be taken to attach to every servitude without any express stipulation to that effect being inserted in the treaty by which the servitude was created.

That is not established.

The fourth was, that a right of fishing of the kind now in question is and was at the date of the treaty recognised as a servitude.

Well, it never was at any time, at the date of the treaty or at any other time.

I have shown, therefore, that the United States has not been able, in the course of its argument, to keep to its own definition of a servitude. It has not been able to establish any one of the propositions essential to the proof of its case. Upon a close examination of all the authorities that were laid before us, it turns out that those authorities themselves related not to international law, but to a quite different system of jurisprudence, with which the negotiators of that treaty were wholly unconcerned; so that there is an end, I venture respectfully to submit, of the doctrine of servitude.

I have a statement of the extraordinary variations upon the different authors in relation to servitudes. They can scarcely, any of them, be got to agree on almost any essential characteristic of the doctrine. Some say that it is a real restriction on sovereignty in general. Others say it is a real restriction on territorial sovereignty. And those again are divided into two classes, those who say it is a restriction on the power of the State within its territory, and those who say it is a restriction on the powers of the State over the land forming its territory.

I do not know whether the Tribunal would care to have these authors who, on all of these different points, have expressed these opinions.

For instance, take the first class, those who say it is a real restriction on sovereignty in general. They are: Klüber, Von Neumann, Lomanaco, Despagnet, Gareis, and Merignhac.

Then those who say it is a real restriction on territorial sovereignty. Of those the first class are the ones who say it is a restriction on the powers of the State within its territory: G. F. De Martens, Heffter, Hartmann, Heilborn, Bluntshli, Calvo, Creasy, Pradier-Fodéré, Rivier, F. de Martens, Chrétien, and Bonfils.

I need not go into great detail over it.

Then there are those who say it is a restriction on the powers of the State over the land forming its territory: H. P. Oppenheim,

Holtzendorff, Von Ullman, Fabre, Hollatz, Phillimore, Hall, Wharton, Fiore, L. Oppenheim, and Diena.

Then there are some who say it is a misleading conception, and that it is desirable to get rid of the idea. I think those deserve special enumeration: Bulmerincq, Von Liszt, and Nys.

And then in modern times: Challandes, Schmidt, de Louter, Fricker, Arrigo, Cavaglieri, and Jellinek.

I need not give the expressions used by some of these authors with regard to servitudes. There are some who have gone further than I venture to go, and say that the whole doctrine is only appropriate for a museum of antiquity.

Then I think I really need not give the other authors, some of whom say it may consist *in faciendo*, and others that it does not consist *in faciendo*.

It does not matter how many of them say it does or does not, but it is rather important to take those who say it is permanent, and others who say it may be for a term:—

Permanent: Wharton, Heffter, Hartmann, Von Ullman, Hollatz, Bluntschli, Calvo, Rivier, Fiore, Chrétien, Bonfils, L. Oppenheim, and Diena.

Term: Klüber, H. B. Oppenheim, Fabre, Lomanaco, and Despagne.

Others say, like Holtzendorff, that it is doubtful, and others say that you cannot safely say either one thing or the other (Sir Travers Twiss) and so it goes on.

I will not trouble the Tribunal with this elaborate investigation, though it has taken many hours, I was almost going to say of ill-spent time, but there is scarcely one single proposition you can  
1035 make about a servitude in which you cannot get about a dozen one way and a dozen the other, or thereabouts, among the various authors who have dealt with the subject.

[Thereupon the Tribunal, at 4 o'clock, adjourned until Thursday, the 28th July, 1910, at 10 a. m.]

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THIRTY-FIRST DAY: THURSDAY, JULY 28, 1910.

The Tribunal met at 10 A. M.

THE PRESIDENT: Will you please to continue, Mr. Attorney-General?

THE ATTORNEY-GENERAL, SIR WILLIAM ROBSON (resuming): Mr. President and gentlemen, before going on to Question 2, there are two matters as to which I would like to say a few words on Question 1.

One is a point with which I do not think I have dealt fully, or perhaps even explicitly, and it certainly merits some attention in the argument.



It is the contention frequently put forward by the United States, that unless their claim for sovereign right of regulation be allowed, the contract leaves them no remedy.

Mr. Turner put it in very clear words when he said, if we are to have the right to fish, but Great Britain is to be left with the right of regulation, our liberty is then a very barren privilege or right.

Well, you Sir, Mr. President, put to him various questions by way of elucidating that part of his argument, but I think it was left very much where I have just ventured to state it. He said we must have a remedy, or our right is worthless.

There, I think, was a confusion of two quite distinct subjects of argument, so far as this Tribunal is concerned.

The primary and essential, and indeed the whole business of this Tribunal, is to interpret, or as we say to construe the document, the contract. Whether or not the parties have provided themselves, or are provided by the law, with a remedy for the breach of that contract on either side is a different matter, a matter which I think does not come strictly within the scope of this Tribunal at all. It is for this Court, the greatest of all Courts (certainly for the present), as for any other Court, to declare its opinion of the true intent of the document, what the parties—I will not always say meant—but what they must have been taken to have meant, by the document in which they express their intention.

But, when that duty is performed on the part of a Court, then the question as to whether or not there is an executive remedy, as to whether the obligation thus defined and ascertained can be performed or not, is a different matter.

Of course no such difficulty arises in municipal law, but such a difficulty is always known to exist in what is called, and might justly and properly be called, international law.

I have heard precisians in language say there is no such thing as international law, because there is no sanction, to use the language of the moralists, there is no superior force by which the declarations and decisions of law can be enforced upon the parties.

That, I think, is a very mistaken view of international law, and does but little justice to what is a real, though vague sanction, standing behind all the declarations of the law of nations. There is a sanction, if you like, not always operative, not always present or felt by the parties, but there is a sanction in the great force of public opinion, that is a power to which nations have to yield in spite of sovereignty and their independence; there is both within their own borders, and within the limits of the boundaries of the great human community, this persuasive universal but unfailing force which operates sooner or later, bringing with it its own reward and pun-

ishment in the history of nations, and in the credit and position that nations have among each other.

There is no nation now so great as to be able safely to flout the opinion of the world—none. On no Continent can we find any Power, in spite of its army and navy, strong enough to do that, and yet retain any sense of security. A nation who, having put its hand to a treaty, proceeded forthwith to evade, to belittle it, to 1036 defeat it by regulations, technically within its jurisdiction and power, but in reality aimed at lessening the right with which, for good consideration, it had just parted—such a nation would undoubtedly suffer; even if there was not the respect of the world to be considered, there is its own respect. Therefore it is a mistake to say that there is no remedy, because international law provides no sanction of the kind to which we are accustomed as lawyers, when we are appealing to our Courts of Justice, because behind the judge stands the sheriff, behind the Court there are all the forces of the executive government. Therefore, I think, it is erroneous to say that because an international contract gives no remedy, is not backed up by any sanction of the kind known to us in daily life in our own country, that therefore it is a barren right. I think that view does not do justice to the power and scope of what we call international law.

But, even if there were no remedy, even if Mr. Turner's contention were to be taken as true to its fullest extent and in its most literal meaning, still we must not here mix up the two questions of "interpretation" and "breach."

I venture respectfully to submit that the sole point you have to consider is that of interpretation. The question of the remedy, the question of the breach, is another matter upon which this Tribunal, great as it is, can really pronounce no judgment.

Of course in practice, as it happens in this particular case, Great Britain has I think even removed this difficulty, by the submission which it makes to this Tribunal, and which perhaps any great State would be unwilling to make to any other State, namely, it has expressed its willingness to submit the question of the reasonableness of its regulations to this Tribunal, which, of course, diminishes very much the difficulty that Mr. Turner anticipated. But, I am putting that out of the question for a moment, because of course, after all, we have to treat this as a question of construction, and Mr. Turner might urge, and did urge I think, that you must, if possible, construe the contract so as to give a remedy. That, I think, is a very reasonable observation. That is to say, if, in the terms of the contract, it is certain, and is shown that the parties have had in mind, not merely a definition of their mutual obligations, but they have also



been considering how one is to enforce them against the other, then, of course, the business of the Court is simplified to a large extent, and it will give such a construction to the contract as is necessary to give effect to the intention of the parties with regard, not merely to their obligations, but to their remedy.

No question, of course, of that kind arises here. The construction of the contract, according to the argument which I have already put before the Tribunal, in no way justifies this Tribunal going beyond the question of defining the obligation of the parties, and saying we are going to construe the contract in a particular way not intended apparently by the parties, certainly not expressed by the parties, in order to give to one of the parties a remedy which is altogether outside the contract. So that looking at the question of remedy, we say that is to be left to the law in this case, to international law, just as in the ordinary courts the judges would decide the meaning of a contract and say, we leave the remedy to the law, we tell you what the obligation was, when we have told you the obligation by our judgment, then there are further steps which it may never be necessary for you to take, but with which we have nothing to do. If, having given our judgment in favour of the plaintiff, the defendant will not obey, then the plaintiff must go and enforce his remedy—a totally different proceeding from his coming and asking, not merely for judgment, but for what we in England call execution. I do not know what the parallel term may be in other systems of law.

Therefore, the difficulty of the remedy affords here no kind of ground for interfering with the strict principle of interpretation. That is the proposition to which I have been directing these observations, and I think, as a matter of law, it can scarcely be contested.

SIR CHARLES FITZPATRICK: But independently of the general principles of international law, surely there is the law of the parties as contained in the treaty under which this reference comes before us.

SIR W. ROBSON: Yes, Sir.

SIR CHARLES FITZPATRICK: We have to apply that law.

SIR W. ROBSON: The law of the parties, as Sir Charles says, is to be found in the document.

SIR CHARLES FITZPATRICK: Not only in the treaty of 1818, but under the treaty under which this reference is made.

1037 SIR W. ROBSON: Certainly.

SIR CHARLES FITZPATRICK: And we have to consider sections 2 and 4, especially section 4.

SIR W. ROBSON: I think I am putting my case a little lower than I need. Reminded by your observation, I did not put my case quite as high as I might, because here the parties, as Sir Charles has said, have made a law for themselves, not only in the treaty, but also in the contract which brings us all here, not only under the treaty under consideration, but also under the treaty of arbitration. They have

submitted to a particular mode of ascertaining their remedy, as well as defining the interpretation. You are quite right. It is not often an advocate commits the error of putting his case a little lower than it may be put, but I think perhaps I did not that occasion.

The argument which has been so prolonged, and which has covered such an area of ground, is really brought to a point by the question put to me by Mr. Justice Gray, I think, shortly before the last adjournment. He said: What is the scope of the sovereignty? I have not his words before me, and Mr. Justice Gray will see whether I correctly interpret the question he put: What is the scope of the sovereignty that you are claiming?

JUDGE GRAY: Pardon me. "What is the scope of the limitation of the sovereignty?"

SIR W. ROBSON: Yes, Sir. He desired to have made a little more explicit the limitation that would be put upon the exercise of the sovereignty, and which of course I admit must be put upon the exercise of the sovereignty. In fact, if I may interpret his language for him, it would be this: How are you going to make clear to us that there is not in this regulation any derogation from the grant? That is a technical phrase in English and American law which I think will be quite intelligible to the learned arbitrators generally. A man having made a grant of a right must not, of course, so exercise any privilege or power that he himself retains in a way to diminish or impair or impede the effect of that grant.

"Now," said Mr. Justice Gray, "how do you define, how do you circumscribe the limitation that you admit to exist? Upon what principle do you do it? What is your measure?"

Well, now, it is perfectly clear that there must be no derogation of the grant. Any power of regulation that you have reserved must be exercised reasonably. But you have first of all to ascertain what the grant is. I think it is some omission on the part of the United States counsel thoroughly to consider that point that has given rise to some little confusion here; and, as I respectfully submit, to some little fallacy in their argument.

There is really no difficulty in ascertaining whether or not we are derogating from the grant when we have found out what the grant is.

The document was very careful indeed to indicate exactly the limitations upon their right, and upon our power. The more you look at this treaty, although framed by laymen, and not by jurists or lawyers, but just framed by ordinary men of affairs, the more clearly we see how well their own common sense seems to have guided them. They put in the words "in common with British subjects." Why? Because those words operate as a limitation both ways.

They say on the one hand to England: You must not exercise your jurisdictional power or any powers that may be retained to you in any way which operates unfairly as between American and



English fishermen. That is what the words say on one side. That is the limitation upon our sovereignty. And the Americans are well content with that limitation, because they say: Well, this sovereign power, like other sovereign powers, may act unreasonably, but after all it is not likely to put regulations upon its own fishermen which would be vicious or vindictive, in order to hurt us, the Americans, so we will run the risk of that, we will accept it in this rough world where you get nothing very perfect, we are content to take that as a fair security, that Great Britain will not proceed to derogate from its own grant, having given us privileges with one hand, it will not proceed to take them away with the other, because if it hurts our grant, if it proceeds in any way whatever to diminish the privilege it has given to us, it cannot do so without hurting itself. That is to say, without belittling the privileges enjoyed by its own fishermen. Of course, if Great Britain went further than that, and proceeded vindictively to hurt even itself in order to injure the Americans, a

1038 thing, by the way, which is not an absurd or unlikely event, because we are well accustomed—in what are called fiscal conflicts—to that as a principle of action, where the only way of hurting the other person is by injuring yourself, and it is done, and gladly done, from motives of high policy. But America takes the risk of that, and says: We will not anticipate that danger, and if we were unnecessarily hurt, viciously hurt, if in order to hurt us Great Britain hurts herself, then behind this treaty, behind us and behind Great Britain, stands the fair-minded opinion of the civilised world. So they thought they might safely take that risk. But, the limitation for which Mr. Justice Gray asks, I think, is to be found in those words, and, equally in the same words that limit our right (of course this is another aspect of it), they declare the right of the Americans. They put a limitation also upon them. They say: Whatever Great Britain enjoys you shall enjoy. That is your security. But, also, you shall enjoy nothing more. Your fishermen in these waters cannot constitute a privileged class beyond other fishermen. All the right that we give you is simply a right to make you part of our own public in these waters. This is a public fishery, and so open to all the subjects of the King, upon certain terms. We will open it to you upon the same terms. That is the English of the treaty. That gives you the measure of the liberty, tells you exactly what the grant is, and puts restrictions upon any attempt on the part of the sovereign Power, Great Britain, to diminish it, or on the part of the American or foreign Power to enlarge it.

So there you get exactly the measure to which Mr. Justice Gray directed my attention. I am obliged to him for enabling me to bring my argument to a point and a test in this way. It may be right or wrong, but at all events that is the view I take of the quality of the

contract to which Mr. Justice Gray was good enough to direct my view.

THE PRESIDENT: Please, Mr. Attorney-General, when did the words "in common with British subjects" first come in?

SIR W. ROBSON: I think almost in the last protocol.

THE PRESIDENT: And the word "forever"?

SIR W. ROBSON: I think that came in early. That of course was a great subject of conflict. There seems, curiously, to have been a controversy about the alleged permanence of the right, but undoubtedly it played a very great part between the negotiators. They were afraid that this right of theirs, the right to fish, which of course was not merely a right upon these little scraps of coasts, but which was then the far greater right of fishing on the common sea—they were afraid that the whole question of the fishery itself on the Banks, and the inshore fisheries, might be opened up if there was any future war between Great Britain and the United States. Of course, at that time, when the world was in so perturbed a state, there was always a danger of war, and especially, one is bound to admit, on the part of every State a danger of war with Great Britain who was fighting, not merely for its own existence, but for the dominion of the seas, upon which, according to its view, its existence then depended. And so the United States now said: If we are going to have this fishing right we want to make sure it is going to be ours always. We, on the other hand, Great Britain, said: No, you cannot have a liberty eternally; the fact that you have it given in those terms means that it is a determinable privilege.

THE PRESIDENT: Did Great Britain accede to the theory of perpetuity of this treaty before the seventh conference?

SIR W. ROBSON: No. It acceded to the word "forever" before the seventh conference. No, perhaps I am wrong.

THE PRESIDENT: I think not. The word "forever," I believe, appears first in the seventh conference, but the idea of perpetuity, of course, was contended for on the part of the United States from the beginning, but they expressed it otherwise. They expressed it in such words as "permanent," "continuing," but the word "forever," I believe, came in only at the seventh conference.

SIR W. ROBSON: It came in at the third conference, I think, Sir. United States Case Appendix, p. 310. That is the third conference.

THE PRESIDENT: And were they accepted by Great Britain?

SIR W. ROBSON. I think not at first. There was another draft and they missed those words out.

1039 THE PRESIDENT: And then there is another draft. The words are not in the fifth conference. They seem to have been accepted only in the seventh conference.

SIR W. ROBSON: Yes.



THE PRESIDENT: On one side the word "forever" was suggested, and on the other side "in common with British subjects." So that one was a concession made to the British negotiators, and the other a concession made to the American negotiators. We have no protocol of this conference, but it might be supposed they were mutual concessions.

SIR W. ROBSON: I am much obliged for the suggestion. They both come in together. Of course they are introduced at the same time.

THE PRESIDENT: Not introduced together.

SIR W. ROBSON: But they both come in together, and one may assume, as I have in argument, when two clauses of that kind come in together they have some connection.

There is just one point that Mr. Peterson reminds me I had not mentioned, and he thinks I ought to mention it. It is not on this particular point but connected with the negotiations. It has reference to what Mr. Rush says in his letter of the 12th August, 1824, p. 122, United States Counter-Case Appendix, touching the controversy with France about the right of America to go on the western shore. The Tribunal will remember that the words "in common" are now stated by the United States to have been introduced in order to exclude the notion of an exclusive right in the United States, because the French, who had got the liberty to fish on the western coast, were then claiming an exclusive right. According to Mr. Turner's argument these words were brought in to prevent the Americans doing what the parties knew the French had been doing—setting up an exclusive right. I have dealt with that point, and I have said that it was a very remote and conjectural reason for putting in the words, but I am now reminded that the Americans, at the time they admitted the words "in common" into the treaty, did not know that the French were claiming an exclusive right at all, because Mr. Rush, at p. 122, said that:—

"The pretension of France to an exclusive fishery was not to be supported. I admitted, as one of the American negotiators of the convention of 1818, that we had heard of the French right at that time, but never that it was exclusive. Such an inference was contradicted not only by the plain meaning of the article in the convention of 1818, but by the whole course and spirit of the negotiation, which, it was well known, had been drawn out into anxious and protracted discussions upon the fishery question."

So that now it appears that the reason suggested by the United States for introducing the words "in common" is more improbable than ever. Instead of them having been introduced in order to prevent the United States from doing that which the French had done we know from one of the negotiators that they never knew that the

French were claiming an exclusive right. If they had known it they had forgotten it.

THE PRESIDENT: Had not the Americans recognised in the treaty of 1778 that they had an exclusive right?

SIR W. ROBSON: Yes, they had, but the two statements are not very difficult to reconcile. Mr. Rush, who was writing this letter, was negotiating in 1818. In 1778 a treaty had been made between the United States and France, during the war, in which the United States had recognised the right of France on the western shore as exclusive, but Mr. Rush—I am taking his own words—says that it was not present to his mind in 1818. I dare say that if any of us, on behalf of our respective countries, sat down to make a treaty, we might very well have forgotten treaties thirty or forty years old, which had lapsed; because the treaty of 1778 had been denounced. It was no longer an operative document, and therefore it would not be the business of anyone to look it up and consider it among the material documents in making the treaty of 1818. Let us say that the declaration of the United States in the treaty of 1778 with regard to exclusion had escaped recollection; so that, when the parties sat down, in 1818, instead of providing against a repetition of what was called the French danger or rather the French interpretation, they did not know there had been any such interpretation and could

not therefore have been providing against that. That is the  
1040 only observation to be made on Mr. Rush's letter, because, of course, that the right was admitted as exclusive is apparently clear, and Mr. Rush's statement is equally clear, and I am taking Mr. Rush's own words. Of course, we must take it as that of a responsible and distinguished man, and we must conclude that he had forgotten all about it when they negotiated this treaty. I think that completes all the observations I have to make on Question 1.

THE PRESIDENT: Had not the exclusiveness of the French right been, in a certain manner, acknowledged also in the declaration of the British King in 1783?

SIR W. ROBSON: That, of course, is a question. We fought about that for something like one hundred years. I am glad to say now that it is taken out of the way of the law officers of the Crown. May they pursue their way in peace without that question. It has already weighed upon them for over one hundred years. We said that we had not made the right exclusive, but we will not wait to go into that now. There was some ground for our contention, but, undoubtedly, the treaty with France with relation to that right was as many treaties are. The parties were anxious to keep the peace, and they were willing to leave a few difficulties for their descendants. The French demanded the insertion of the word "exclusive" in the treaty, and England refused to allow the word "exclusive" to be



inserted. It was deleted, but both England and France knew that they were leaving open a subject of controversy. England said: "We will strike out the word 'exclusive,' and that means that their right is not to be exclusive." France said: "Well, the word 'exclusive' is gone, but still if we find the general political conditions favourable, we shall insist that the thing remains although the word is gone, because of the nature of the right." Each knew perfectly well that the other was going to raise the contention. They might have settled it at once, but they wanted to have a peace, and they thought that their successors in various high offices might as well have something to think about, something to talk about, and something to quarrel about, at some later stage, and they did not trouble much over it.

Before I leave Question 1, may I just make an observation, not an argument at all? The Tribunal, a few days ago—I have not the note before me, but I think I recollect what was said—drew attention to the provisions of Article 2 of the Treaty of Arbitration, which enabled either of the parties to bring to the attention of the Tribunal any legislative or executive acts of which either complained in order that each side might have full notice of the grounds on which the other objected to any such executive or legislative act, and that the Tribunal itself might have such notice carefully set out. The President said that:—

"It would facilitate our work and expedite the final disposition of this case if the parties supplied us with a detailed statement of the particular provisions of the statutes and regulations to which they object, accompanied by an exposition of the grounds of such objection. The objections of each party to be communicated to the other. The objection should be made known to the Tribunal and the adverse party within one week from this day and the answer of the adverse party within one week thereafter, so that the Tribunal, before taking the questions submitted under advisement, may have the benefit of a complete statement of the objections from each party, with such answer as the other party may desire to make. In addition to the written objections the Tribunal would be pleased to receive such further oral statements as either party may choose to make." [P. 872 *supra*.]

As far as that is concerned, as representing Great Britain, and after consulting with my learned colleagues, I thought it was not worth while, in so far as Great Britain was concerned, to persist in the objection which it had made as to the visit of certain American ships of war to the scene years ago, because I said that, although we contested the legality of the act, we did not appear to have made a very fervent protest, and I do not think that we did object to the manner in which the United States behaved on that occasion. We respectfully submit that the United States was mistaken as to its rights,

but nobody could doubt the propriety and courtesy of the manner in which its acts were carried out. Mr. Alexander, who was on board one of the ships, was of great assistance, and we do not desire to revive a perfectly useless complaint, because, if the Tribunal decide in our favour, well, that is quite enough, and the visit of the "Grampus" and other ships becomes a very unimportant question. We do not want damages. There are no damages. I believe that Mr. Alexander behaved in a very proper and courteous manner. He certainly did not do anybody any damage whatever. Therefore, I said that we dropped it.

1041 THE PRESIDENT: Is the action of Mr. Alexander to be construed as a concurrence in the enforcement?

SIR W. ROBSON: I think it was claimed as such. Therefore, of course, in my view, it would not be a legal act, but, after all, what we want is an opinion for the future. We do not care to rake up events which are now unimportant. I mean that if this Tribunal tells us what the rights and obligations of the two countries are, its decision will be observed, and we do not need to trouble about acts which preceded the full and complete knowledge in regard to our rights that we hope the Award of this Tribunal will give us. So that we do not trouble the Tribunal about that event at all.

The United States, of course, as they are quite entitled to do, do not quite take that view. They have set out a large number of executive, or mainly legislative Acts, of course followed by executive acts, as far as Parliamentary Acts are followed by executive acts, of which they complain. The document is probably now before the Tribunal, and I think it will be found that really they cover all the regulations which, we say, were made within our jurisdictional rights, and which the Americans say we have not the right to make. That will be decided really by the answer to Question No. 1. That is to say, that if Question No. 1 is answered in favour of the United States, then all our acts of jurisdiction, of course, would be vitiated by the absence of their consent. But suppose the Tribunal decided that no such regulation was proper without their consent, there is no occasion to have enquiries, or further litigation over the matter lasting months. There would be no need for it because the incident would have been decided by whatever answer is given to Question No. 1. However, the United States, quite within their rights, put forward all these different grounds of complaint, but they put them forward as though they had something to do with this arbitration. I submit that they are just the same thing. It is really asking the same question as Question No. 1, but asking it over again with reference to all these different statutes and regulations that we have put before the Tribunal. However, as they put them forward as an independent ground of enquiry, we beg to ask for a full exposition of the



ground of objection. I only want to draw attention to this; I am not making any complaint, or anything of the sort; I am only just trying to understand our own position in the matter. They have put forward all these regulations. There is a great number; in fact it really might be rather convenient to have them in existence in order to show what a lot of excellent regulations we have made, because they are all set out here, but there is no exposition of the grounds of objection. Well, we have to put our answer in within a week, and I only thought it would be desirable to draw the attention of the Tribunal to the fact that all we can say in answer to these different provisions is just to refer to our case generally. There are no explanations and no exposition why they object to any particular regulation other than the mere general statement that they object to all. They object to them on the ground that they are not appropriate or necessary for the protection and preservation of the fisheries, and that they are not desirable on grounds of public order and morals, and so on. So I hope the Tribunal will understand that we are not seeking to avoid dealing effectively with any objection they may put forward; but all we can do is simply to give to these objections a general denial, just as they have put them forward in a perfectly general way without any exposition of their particular reasons. I would respectfully invite the United States and their distinguished representatives to consider whether it is worth while dealing with all these different regulations one by one, as they obviously all depend on the general question: Is Great Britain entitled or not to make any regulations whatever? I throw that out just to explain the character of the answer that we would be obliged to give within the week.

Now, I pass, and pass with pleasure, to the second question, a very simple question, as I venture to submit, so simple that I have sometimes been inclined to wonder how really it comes to be put at all, because you can scarcely put this question to an international tribunal without the question almost answering itself. I take it, by permission of the Tribunal, first of all free of all controversy, of what I might call the historical controversy, out of which the question may possibly have arisen. I take it first of all just as a plain question put to an international Tribunal in relation to a treaty with which we are all so familiar; and I say, most respectfully, but confidently, that there can be only one answer to it when one takes the question literally and simply and in relation to the international law.

Now, what is the question?—

“Have the inhabitants of the United States, while exercising the liberties referred to in said article, a right to employ as members of the fishing crews of their vessels persons not inhabitants of the United States?”

1042 If that question were put to any lawyer, or to any ordinary person, who was not acquainted with all the controversy there has been, what would he do? He would say: Well, let us look at the treaty. He would turn to Article 1 of the treaty, and there he would see that the right was only conferred upon "inhabitants of the United States." He would then say: Well now, the treaty does not give the inhabitants of the United States any right to bring on the ground those who are not inhabitants of the United States; is there any other ground than that of the treaty upon which such persons might be brought within that territory? That is, persons who are not inhabitants of the United States. He would be informed at once both by the United States and Great Britain, that outside the treaty no one has a right to force himself into the jurisdiction of Great Britain without Great Britain's leave—no one; and as no one has that right, still less has an inhabitant of the United States the right to bring foreigners in. I am going to deal with it only as a question as between Great Britain and foreigners. I shall deal afterwards with the collateral matter about inhabitants of Newfoundland. But, keeping that aside for the moment because I want to meet the question in its simplest form, in a form with all the fringe cut away from it, with all the dust of controversy settled so that we may look at it with clear and undisturbed eyes, can there be but one answer to the question? The fundamental proposition which no lawyer here will deny is that every nation has the right to exclude aliens. Every Government has the right to exclude aliens unless it has parted with that by contract, and the contract, as we have seen, during the long argument which has been going on here, must be, if it detaches sovereign right, express, it must be written, and it must be fully stated within the four corners of the written document. We need not trouble about this because this Question No. 2 does not turn upon that. The only question here is, where a nation has given to a particular class of aliens a right of entry, will anybody contend that it has thereby parted with its right to exclude all aliens except the special favoured class? There is only one answer to that. That is not a matter or argument—that is as far as I am going—I am going step by step. But, as far as I have got now, I say it is not an argument. I am not arguing here, I am merely laying down that which nobody would ever dream of denying, that the very essence of all nationality, of all sovereignty, is the right to preserve, as people will say, inviolate, their own shores, keeping their shores from the foot of the alien except in so far as they choose to admit him. Therefore, nobody would contend that by any act extending this right we in any way limited or diminished our rights in regard to the exclusion of Frenchmen, Spaniards, or anybody you please. We may



exclude them or we may not exclude them now. How can it be suggested that we have done anything to lessen that sovereign right by the liberty we have granted? I cannot even imagine it. My difficulty in dealing with Question No. 2 is not to answer the argument, but to state my opponent's argument in a way which does not seem to answer itself or refute itself.

We have therefore got the right to exclude every alien except the aliens specifically mentioned. But in this case the alien comes—the United States will forgive me for referring to them, for the sake of the argument, as aliens—the alien comes and says: You have given me the right to come in in order to do something, it may be to trade, or fish, or walk about, and I find it convenient to have other persons assisting me in my privileged pursuit. My answer to that is: Very good, you may bring in as many as you like of the same class as yourself; we have given the privilege to your class; we do not object to you having all you feel that you can afford. There are 80,000,000 of you—observe some moderation inside of that limitation, and even then I believe that they would all be welcome. Inside of that limitation we put no limit upon your right to bring as many servants as you like. That is why I listened with some surprise to *Wickham v. Hawker*. The United States says: I am entitled to bring my servants. Certainly, and then it quotes *Wickham v. Hawker*, where the Duchess of Norfolk gives and Lord Suffolk gets the right to go and hunt a stag and some ingenious lawyer says: You have the right to hunt the stag, but you must do it all yourself. Well, hunting stags in complete solitude is not a very engaging or inspiring entertainment, and Lord Suffolk said: Well, what about carrying the stag away? He brought some persons on the ground to help him to carry the stag away. The ingenious lawyer, acting for the Duchess of Norfolk, said: You have no one to help you to carry the stag away; you must hunt him, and kill him perhaps 10 or 15 miles away from home, but if you want to carry him away you must do it yourself. As Lord Suffolk had got the right in order to enjoy himself, there was not much prospect of enjoyment left in a hunt which was to be conducted by one person of a quarry five or six times his own  
1043 weight which he had to carry home himself. So, the law was not baffled by these ingenious suggestions—of course, as such a grant as that carries with it the implied right—as it is to take a profit, it being not merely fun but hunting for profit as well as amusement—of the grantee, Lord Suffolk, to have with him such persons as are necessary for the full enjoyment of his right and for the taking of the profit that he had acquired. It is perfectly simple. But what on earth has that to do with this case? We are not saying that the United States cannot bring persons to take their fish away. They may bring 80,000,000. All we are saying is: We have told

you that they must be inhabitants of the United States, and do you say that you have not enough? Do you say that if you are not allowed to take Norwegians, and Scandinavians, and Poles, and so on, you cannot carry out your right at all? The United States is not so entirely bereft of population as all that.

There is another answer that they may make and do make. They say it is very expensive to fetch inhabitants of the United States, that they are more profitably employed, that they will not go and face the dangers and discomforts of the deep. We say that is very likely so; but if the right given you attached only to your own inhabitants and was given for their personal benefit, as we find when we come to read the documents, it does not enable you to go beyond the terms of your treaty, and let every master of a fishing-smack in the United States, assuming to exercise a sovereign right, say: "I, Captain John Smith, am going to bring foreigners into the territory of Great Britain; Great Britain has allowed me to come and, in allowing me to come, it has allowed my vessel to come, and, in allowing my vessel to come, it has allowed anybody I choose to put on my vessel." And so the United States, by that free and obvious train of reasoning, are apparently able to bring foreigners into a country which desires to exclude them, and which has never given them permission to enter. I do not want in the least to speak disrespectfully of the Question, but I really cannot conceive how, as a matter of international law, it would be possible for this Tribunal to say affirmatively that the inhabitants of the United States, while exercising the liberties, have a right to employ foreigners.

They think that because we have given them the right to enter, they, without a word of express language in their favour, have the right to extend the treaty privilege to persons who are forbidden by our law to enter. When this treaty was made in 1818 the law was very jealous indeed of Newfoundland. It was not so much like a country as like a fruitful field or garden where it was a privilege to be permitted to enter and take the produce of the earth. The framers of the treaty said: "You draw our attention to the fact"—and they drew it very pathetically in the eloquent letter of Mr. Adams—"that under the old arrangement between us, when we were all members of one Empire, some of your fishermen on the coast of Massachusetts had been earning a living in the Bank fisheries. They had not been earning it in the inshore fisheries at all." And that is a consideration worth bearing in mind when we come to deal with attempts to enlarge this right. They had been earning a living upon the Banks, and it was pointed out that it would be a great hardship on them if the change of their nationality were to bring about a loss of their livelihood; and that was a contention put on grounds of humanity. It was not put on grounds of partition of empire or division of sover-



eighty; it was put, and very properly and very forcibly put, as an appeal to the good feeling of the English people in relation to a class who had once been their fellow-citizens, and whom they hoped they might yet live with in peace and amity. It was said: Do not deprive these men of their living. That was the argument. It was not a demand on the part of the United States for a share in sovereignty. Mr. Adams did not put it upon the ground that when this partnership was coming to be wound up they would like to have, as their share of the assets, the right to fish on the Banks of Newfoundland. Not at all. Not a word of that sort was said or thought of. He said: Do not let us throw these hardy men out of work. Do not let us take away the bread from their wives and families. Let us give to these individual inhabitants of the United States a right to continue in peace, the only means by which they are accustomed to live. That was it. And Great Britain replied, and I believe replied in a generous spirit. When one reads all these letters and documents one gets the impression that each party is fighting for some advantage, as, of course, they are, and I think one rather too easily assumes that both are animated by motives of a selfish and sordid character. Well, that is the effect which would be produced on the mind of a superficial reader when dealing with these diplomatic negotiations between States, as, indeed, you might have the same effect when you are reading the lawyers' letters between two parties with regard to some contract or purchase. But we know that behind the lawyer and  
 1044 behind these hard-bargaining documents we have, perhaps, two gentlemen who are not unwilling to meet each other in a friendly and generous spirit upon matters which are of detail, or thought to be of detail. And it was so here. Lord Bathurst was an English gentleman of most kindly disposition, as, indeed, was Lord Shelburne, who was driven from power because he made the peace of 1783, but who still leaves a tradition of his own amiable and high-principled character. These men thought: Well, now, we want peace. At any moment at that time, in the then state of the world, England stood in danger of war. They thought: We want peace. We will not haggle and bargain over every detail. We will make this concession to that class whose claims are so forcibly put before us. And so they were asked on grounds of humanity, and on grounds of humanity they made a concession to these individuals.

Let me read Mr. Adams' letter, which really is—

JUDGE GRAY: There was also, Sir William, an economic ground urged—that it might give the inhabitants of the United States the ability to purchase British goods.

SIR W. ROBSON: That it might give them the ability to purchase manufactures, yes. That, I think, again, may be used rather to strengthen my observation.

THE PRESIDENT: Would these motives of humanity and regard for these fishermen who had changed their nationality last for ever—to following generations?

SIR W. ROBSON: At all events, we were content to put it upon a durable basis. I am only putting it the way it is put to us first. Of course, I am not importing a claim to humanity as if it were necessary to my argument at all, but am simply showing how the United States puts it. Where is there any pretence here in the documents accompanying the treaty that they were to have the right to enlarge the privilege so as to go to persons who are not inhabitants, who had no such claim on the consideration of the British Government, and who are not likely to use their money in purchase of British goods, because neither on humane nor on economic considerations would a foreigner be included?

THE PRESIDENT: What was the subject-matter of the privilege conferred upon the inhabitants of the United States? Was it the right of entering British territory, or was it the right of taking fish?

SIR W. ROBSON: It was the right of entering and taking fish.

THE PRESIDENT: Yes. In the treaty they speak only of the right of taking fish, of course.

SIR W. ROBSON: Yes.

THE PRESIDENT: Not of the right of entering.

SIR W. ROBSON: Well, they could scarcely get the fish without going to the ground.

THE PRESIDENT: Of course.

SIR W. ROBSON: However, that would be an implied necessity. But it is the right—let us keep to the words strictly; it is of importance here, because this is, as I am proceeding to show, not a right that ought to be enlarged except on very clear grounds. No right ought. But when you come to look at all the circumstances attending the grant of this right, this right least of all should be enlarged, except on the clearest grounds. This is only a collateral point.

SIR CHARLES FITZPATRICK: There is where the whole question turns: What is the right?

SIR W. ROBSON: Yes.

SIR CHARLES FITZPATRICK: Is it not a right, practically, to trade, that was given to them—to come in and take fish for purposes of trade; and all that is ancillary to that is to be considered as conveyed with it?

SIR W. ROBSON: They are entitled to come in and take fish for the purpose of selling. That may be called trade. I do not know  
1045 that it hurts me to use the word "trade," but still it is not trade. In a case of this kind one had better keep to the words. It is rather dangerous to say one word is synonymous with another. If one word is synonymous with another and is not in the treaty,



that is a reason for letting that word alone—not for using it; and, after all, the treaty says “fishing.”

I was just about to say that the ground upon which the request was made by Mr. Adams—

THE PRESIDENT: Could it not be said, as the treaty speaks of the right of taking fish attributed to the inhabitants of the United States, so the personal limitation “inhabitants of the United States” refers only to the right of taking fish; so that the right of taking fish is limited to the inhabitants of the United States, without affecting the question of entering the territory? The question of entering the territory is not decided directly by the treaty; but is a collateral issue.

SIR W. ROBSON: Then, in that case, nobody has the right to enter the territory. The point as it is put to me by the learned President is really quite sufficient for my purpose. In fact, there is no way of putting this point so as to escape the words of the treaty. For instance, let me take the point put by the learned President: The inhabitant of the United States has a right to take fish.

THE PRESIDENT: Nobody else?

SIR W. ROBSON: Nobody else. But nothing is said about the right of entry. Then, if nothing is said about the right of entry, that does not mean that anybody else may enter, though he may not take fish. It means that nobody else may enter or take fish, if nothing is said about the right of entry. This is really the simplest question that ever was asked, if one keeps to the words. Nobody may enter. The whole fallacy of the United States consists in treating this right of entry as though it were open to the world.

Perhaps I had better, instead of reading Mr. Adams' letter, just follow the course of my notes one or two steps farther. I will read this letter again, but I prefer keeping to the law, rather than to benevolence and humanity talked of here. I am a little more at home on the point of law, I believe. I will just read what the law is; and the essential consideration with which one ought to approach this question is this: I said the right of every nation is to exclude aliens. One may give it a technical name, “*droit de renvoi*,” which is an essential attribute of every sovereign State.

Take General Halleck, p. 493, because he is a United States author, although of course every international lawyer makes the same assertion. General Halleck says, on p. 493:—

“The right of a State to expel foreigners from her territories is sometimes called the *Droit de Renvoi*. Since every State is obliged to receive its own subjects, even after they have emigrated abroad, so there is a corresponding power of every State to send away a foreign citizen who has immigrated there. This right of a State ceases where a foreigner has been naturalized in the particular State.”

Then he goes on to deal with cases of it; but there is the general principle.

I will just read one other authority, who goes a little step farther—Burge's "Foreign and Colonial Law," 2nd volume, p. 86, on the status of an alien:—

"The jurisprudence of every State makes a distinction between its natural-born subjects and those who are aliens, by withholding from the latter"—

an alien—

"certain rights and capacities enjoyed by the former."

Here is the principle shortly stated:—

"It is the exclusive right of every State to determine to what extent those born out of its dominions shall participate in the privileges of its natural-born subjects."

In the same way, at p. 140, on "Aliens," it goes on—this being again a reference to the "droit de renvoi":—

"It has been held that an alien has no right enforceable by action to enter British territory (r), and this is in accordance with the generally recognised rule of international law."

1046 One does not want authority for this proposition. I mean it is really undeniable that any state may keep an alien out of its territory, as an individual, under a well-constituted system of municipal law, may keep a stranger out of his house. It is just the same right. You may give, of course, whatever rights you please. You may either give them by treaty or you may give them by mere comity without treaty; but that does not affect your right.

DR. DE SAVORNIN LOHMAN: Sir William, may I ask you one question? The question is here which right is given to the Americans. It is, in my opinion, the question whether a right is given to the Americans personally to fish, or whether the right is given to exercise an industry. Have the Americans got to exercise that industry? Then the answer will differ somewhat from the answer to the question if they have personally the right to fish. Will you explain what is the liberty that is given to the Americans?

SIR W. ROBSON: I will. I will take the learned Arbitrator's question and deal with it from two points of view. The first is whether this right to fish is the right to exercise an industry?

DR. DE SAVORNIN LOHMAN: Yes.

SIR W. ROBSON: I will give my answer first, and then my reasons. I would say, first, no. Secondly, I would say that, even if it be a right to exercise an industry, you have not, by changing the word, in the slightest degree extended the privilege. And it is a right to exercise an industry giving to particular persons who may, for the purpose of exercising that industry, employ other persons of the same privileged class. You have not, really, by substituting the



wider word "industry," which now imports many and varied considerations, altered the right.

Now, I take the first question about industry. I will take each of the two questions separately: Is it an industry? I do not know, in other systems of jurisprudence, what distinctions may be drawn between trade, say, and a profession, or a thing like agriculture. In English law, the laws which refer to trade do not always refer, say, to agriculture, and certainly do not refer to the learned professions. Take, for instance, a thing like the law of bankruptcy—and I am just mentioning casually any incidents that come into my head at the moment—bankruptcy was a traders' law, and did not originally apply to agriculture, because agriculture was not a trade, in the proper technical sense of the term, although the agriculturist was really making his living in very much the same way as a trader, but handling different commodities. And so the same distinction went through various Acts relating to workmen; some classes of workmen belonging to trades had certain privileges and were put under certain disabilities which did not apply to clerks or to agriculturists, and so on.

So that the words "trade" and "industry,"—nearly synonymous—are, in our law, not essentially or necessarily the same thing as a profession, say, when you come to give a limited right like that of fishing, which may be a sport, or may be a pursuit and trade—may be either one or the other; call it, if you like, a trade—you have given permission to do it. When it becomes a subject-matter of profit-making, I suppose you will then say the man is not trading, strictly speaking, but he is fishing for profit. Very well, that is what he is doing. He is exercising that privilege—in popular language what you may call his industry. But what difference does that make, that he chooses to call it an industry instead of calling it a sport, or making profit by the pursuit of fishing? It makes no difference. He may say: Well, the moment you call it an industry, then I may employ other people. I do not deny it. I do not deny it at all. Employ as many as you like; but you cannot get your people into your works except by my permission. And I have said the only permission I will give is to you and those of your class. I will not give a permission to any other. They cannot do it.

What, after all, was Newfoundland in 1818? As I say, it was something like a garden—not a very happy illustration—but it was a place where profit might be made, where fish might be caught, exactly as fruit might be taken. And I say: I will allow certain persons, by reason of their nationality or their particular circumstances, to come in and pluck the fruit. When they come in and pluck the fruit, they may take it away and sell it, and say: We are trading. I say: I have no objection to calling you traders. You are traders.

DR. DE SAVORNIN LOHMAN: But, Sir William, you admit, I believe, that it is allowed for foreigners to be part of the shiping crews?

SIR W. ROBSON: In 1818?

1047 DR. DE SAVORNIN LOHMAN: Yes.

SIR W. ROBSON: I am not aware——

DR. DE SAVORNIN LOHMAN: I mean the seamen; not the fishermen.

SIR W. ROBSON: I think not, Sir. I am going a little out of my order, but it is in the course of my remarks to show that we were most jealous against allowing either our fishermen to leave or foreigners to come—most jealous. Perhaps I had better go into that a little more fully. If the Tribunal will allow me, I think I had better go through some of those general instructions first, because they make it a little easier, later, to deal with the argument. I will just finish these two questions first.

We had this ground as a training ground for our seamen. It had, of course, various other uses. It was useful as a great food supply. It was useful as a source of employment for our citizens; but the use upon which most stress was laid by the statesmen of the day was the use of this place as a nursery for our seamen; and the legislation shows that clearly. It shows that we were so anxious to train our seamen there that we gave them special privileges, and it shows that we did not allow them to desert. It was one of the causes of the unfortunate war of 1812 that some of our seamen got, as we said, on American vessels; so we claimed the right of search and impressment, and got them off. Now, is it likely that we should have allowed other nations that nursery for their purposes? It is said continually that we allowed crews of foreigners to be used. All I can say is that I do not know the evidence of it, and it is entirely against all the presumptions, absolutely against all the presumptions. Would we be likely, when we were fighting for these fishing places as a nursery for our fleet, to allow unrestricted entry of other countries, to train their seamen there, by enlistment under colonial flag? We would never do it. You may show cases of foreigners getting on board these boats; *de minimis non curat lex*. Nobody would trouble to turn them off, or trouble about them, because it was not a widespread evil. But when the contention is put forward that these Newfoundland fisheries might be used as a matter of right, or upon any extensive scale, by Frenchmen, for instance—that is to say, within our own waters—or by Spaniards, with whom we were continually engaged in war, I cannot imagine England allowing it for a moment.

What was our great struggle through all those years, before 1818 and up to 1818? To get sailors. We had the “press-gang” going around every maritime town in England—the “press-gang” which, under pretence of enlistment (I believe it was supposed to be a vol-



untary service in those days), dragged in any man who presented the slightest nautical appearance. If any such man was found in an English country town, he was seized; that is to say, he was told that he must voluntarily enlist. And he was carried off and kept for years fighting for his country, and getting, in that pursuit, such satisfaction as his own patriotism might supply to his mind. In those times, having no law of conscription, no right to call upon our citizens to serve whether they would or not, we were merciless in the way in which we applied, illegally, the right of seizing British citizens and putting them on board our ships. We carried it so far that we claimed the right to search American ships; and the United States, after it became an independent nation, was, I have no doubt, well justified in its complaints: You are taking our seamen away. You call them your own, but you are really stopping our ships and taking our crews. And what was the result? Can it be supposed for a moment that, in that state of things prevailing internationally, we allowed foreigners to come and train their seamen in our fisheries in Newfoundland? I cannot imagine such a thing.

The statement has been made, and has found currency and support by continual repetition, that foreigners in 1818 came on board these boats. Well, I ask for the evidence. And I was almost going to add: "When I get it, I shall not believe it." You may get some evidence that foreigners here and there were on board these boats—probably impressed; but that foreigners generally were recognised as a proper class to exercise the right or privilege, and receive their training on those ships, is, I say, not only without evidence, but against every presumption of fact that arises in this case.

I had better follow that up a little, I think. I take, for instance, the statute with which we are all familiar, of 1819, to be found in the British Case Appendix, at p. 565. This is the statute passed, of course, in order to validate the treaty of 1818. Mark how careful they were about aliens, and see how little ground there is for the suggestion which has found its way into this case by mere assertion about foreigners being employed in 1818. I read from section 2:—

"And be it further enacted. That from and after the passing of this Act it shall not be lawful for any person or persons, not being a natural-born subject of His Majesty, in any foreign ship, 1048 vessel, or boat, nor for any person in any ship, vessel or boat, other than such as shall be navigated according to the laws of the United Kingdom of *Great Britain and Ireland*"——

And of course our navigation laws were very strict in confining our service to British seamen—

"to fish for, or to take, dry or cure any fish, of any kind whatever, within three marine miles of any coasts, bays, creeks or harbours whatever, in any part of His Majesty's dominions in *America*, not

included within the limits specified and described in the First article of the said convention, and hereinbefore recited; and that if any such foreign ship, vessel or boat, or any persons"—

Now, mark this—

“or any persons on board thereof, shall be found fishing, or to have been fishing, or preparing to fish within such distance of such coasts, bays, creeks or harbours, within such parts of His Majesty’s dominions in *America* out of the said limits as aforesaid, all such ships, vessels and boats, together with their cargoes, and all guns, ammunition, tackle, apparel, furniture and stores, shall be forfeited,”

Then there is the necessary proviso saving treaty rights of the Americans at the end—

“provided that nothing in this Act contained shall apply, or be construed to apply to the ships or subjects of any Prince Power or State in amity with His Majesty, who are entitled by treaty with His Majesty to any privilege of taking, drying or curing fish.”

Expressed, of course, in general terms, as all of these provisos are, but obviously applicable only to the United States. That is one section, and that, I think, shows how unlikely we are to come across any evidence that foreigners were systematically employed.

There is another in 1824 which shows the same policy. That is on p. 567 of the British Case Appendix, section 2 of the statute, the second paragraph from the bottom of the page:—

“And be it further enacted, That no Alien or Stranger whatsoever shall at any Time hereafter take Bait, or use any sort of Fishing whatsoever in *Newfoundland*, or the Coasts, Bays or Rivers thereof, or on the Coast of *Labrador*, or in any of the Islands or Places within or dependent upon the Government of the said Colony; always excepting the Rights and Privileges granted by Treaty to the Subjects or Citizens of any Foreign State or Power in Amity with His Majesty.”

That is to say, the United States and France. Those two had in their very limited areas these rights. But, except the limited rights granted within those very guarded areas, we would not allow an alien to enter. There was no population in Newfoundland. There was no trading. People talk of trading and industry in Newfoundland. What was there, except these cod? Not a thing. There was nothing at all. You went on the land, and you found barren and unsettled soil. As to trading, taking commodities there and bringing commodities back—industry in that sense was not known. There was no one to buy the goods when you got there, and there was nothing but fogs and timber to take away. So that all you had was a right to go and take fish; and that is dealt with by Great Britain in a way which shows her view: “You shall not trade. You shall not exercise an industry in the general sense at all.” We would not even let them buy bait. One of the most significant things in these negotiations is



that fact that we would not let them buy bait, although not much reference has been made to it, because it is not material to any specific question. The fact is, however, that when the Americans made their request to be allowed to get bait, they were told: "No!" We would not let our sailors sell them bait. They were the only people that could sell them bait. We would not let them do it. We said: "No! You have asked for the right to fish. You must bring your own bait, and you must take your own fish back again. No trading rights; no landing rights, except just such rights as are absolutely necessary to enable you to fish. You want, perhaps, two or three takes of fish. Very well; you must dry and cure the first one before you get the second. That is all the right you shall have."

So that, having the word "fish" taken out of the treaty, and the word "trade" put in instead, let us remember what a very narrow meaning was given to the word "trade." No extension of the privilege is gained by the change of the word; because we would not allow them to trade in fish. We would not allow them the ordinary privileges of a trader, in buying raw material for the purpose of his industry. The right was just what it is expressed to be—a  
1049 right to come within our waters; to that extent, a modification of our sovereign right to expel you; a right to come within them, and to stay there, and to throw your lines overboard, or use your proper implements and catch what fish you can; but nothing else; and only to you! Because the very same moment—it is not subsequent legislation, it is contemporaneous legislation—we are saying at the very same moment when we gave this right to the Americans: "Nobody else is to have it. No alien shall come here. No person not a natural-born subject of His Majesty the King, except only those who by the treaties with France and the United States may have the privilege."

So that I am obliged to Dr. Lohman for drawing my attention to the statement made by the United States frequently, and which I dare say I might have overlooked, that foreigners came in vessels there. I say that it is directly opposed not only to the statutes and the documents, but to the whole policy and intent of Great Britain. The Newfoundland fishery was jealously guarded, for that particular purpose of increasing our fleet. At that time the United States was not feared as a naval Power; that is to say, it was a new Power; it had enormous tasks before it, the development of which has since astonished the world, and there was no anticipation that it would be likely to start upon the costly task of maintaining a great navy; because unless you have a great navy, no other is much use. So we did not anticipate that there would be any danger likely to arise to us by allowing this privilege to this young State, or to the inhabitants of this young State, and not to anybody else. There was no

suggestion that I know of, no trace that I know of, of any evidence that you might take foreigners. What would have happened if there had been any such right? Why, take France, for instance. The Tribunal may remember what happened in the French wars—what had just happened before this treaty was made. I forget the exact date when war was declared between France and England, as a consequence of the events of 1789, but I remember that, I think it was in 1793, it was reported to the French National Assembly that the French flag flew nowhere on the high seas except over her fleet and her privateers. The mercantile marine of France was driven off the seas. That was what I referred to yesterday as the first step in that great battle between land and sea—from the English point of view one would say between Napoleon and Pitt. And so the French wanted to train their men. They could do it on the west coast of Newfoundland, if they could get there when war was going on. If they could have done it by sending their men to serve under the American flag, and under American masters, they being in close amity and friendship with America at the time, of course they would have done it; and we should have had that fishery crowded with men learning to become good seamen.

The Tribunal will remember again, though some of those statutes I have not the reference to—they are probably fresh in the memory of the Tribunal, as they are in mine—among the regulations imposed on British seamen was the requirement that they must take so many green men—"green men" meaning young boys, apprentices. As part of the price that they were to pay for the privilege of fishing in Newfoundland, in that close preserve of the British Crown, they were to train so many seamen. Just think of making these provisions and then allowing foreigners to inundate the territory under American or other flags! It would never have been permitted and could not have been tolerated.

In order to see how far such an assertion as that about the foreigners is likely to be true one has only to look at the historic conditions of the time—a most interesting and critical time in Europe, well known, of course, to every nation whose existence was imperilled by the triumphant arms of France for so many years; but to us those things which are here being discussed as if they were interesting legal problems were life and death at that time. I venture, therefore, to say that the statement which the United States Case and pleadings have impressed upon the minds of the Tribunal as a fact is an assertion which has no evidence whatever to support it. We were carefully nursing every inch of our territory with a view to its use in a great national struggle, and our critical point—the point to which our enemy was directing his attention and to which we were directing ours—was the maintenance of our seamen. And



we pushed it to an extent which could not be justified in law, and which brought fresh enemies about our heads as a consequence. But all that shows how little likely we were to give the advantages of our training-ground to any foreign State or any foreign seamen.

Anyhow, I am sure that, without very clear evidence, the Tribunal would not accept that assertion that foreigners were employed, so as to give any reason to the American inhabitants to suppose that they would be allowed to go on employing them. The only relevance of the suggestion that foreigners were then employed would be that it was part of the existing conditions surrounding the grant, 1050 which might give rise to a reasonable expectation on the part of the grantee that he would be permitted to go on employing foreigners. He never did employ them, and he never would have been allowed to go on.

I think Mr. Adams' letter itself, which I was about to read, shows how little likely it was—or how unsuited to the general condition of American fishing the employment of foreigners would have been. It was not a great ship fishery. Of course it was a ship fishery to the extent that you had to go in ships, and you had to have ships of sufficient size to make that long journey and carry an adequate cargo; but there was no question of the Gloucester men at that time employing Scandinavians and Poles. They were not there.

JUDGE GRAY: An alien can be an inhabitant, can he not, Sir William?

SIR W. ROBSON: Oh, certainly.

JUDGE GRAY: There is some significance in the use of the word "inhabitants," then, as distinguished from "citizen" or "subject"?

SIR W. ROBSON: Certainly. That, again, shows the spirit in which the grant was made. We do not make any enquiry into citizenship, which is a matter somewhat difficult of proof. We enquire only into inhabitancy. Then, it would have been very difficult to say "citizens" of the United States. It would have been a rather unkindly limitation on the right, because there were many then in the colony of Massachusetts who might not have taken citizenship of the United States. I do not know how that would be. But Mr. Justice Gray will no doubt remember the long controversy and difficulty there was with regard to the subjects who retained their allegiance. They were to be allowed to leave the severed colonies—that is to say, the United States—and take up their abode under the flag of Great Britain, within a certain time, if they thought fit. But there would be many, no doubt, who would remain, and be allowed to remain, because they were among old friends, although they had not become citizens of the United States. And there was certainly no desire on the part of England to deprive them of the right.

Now, may I revert again to Dr. Lohman's question, from which I have deviated in a somewhat extensive excursion as to whether or not this is an industry? I said, while I have no objection to any words being used that might be synonymous, we have to be very careful about introducing a new word—just as careful as we are about introducing a new alien. We want him to show his right to be there. Is it an industry? He might not buy bait, and he might not buy seines or boats. One thing we were careful about was to see that there should be no trading rights or privileges. In dealing with the question of construction, when so much depends upon general surrounding conditions, I need not remind the Tribunal of the excessive care taken by all nations then with regard to their commercial privileges. The notion of throwing commercial privileges open to all, on the ground that what benefited a community as a whole would bring benefit to each individual person, was a novel idea—unthought of, at least, except by a few academic philosophers in England.

Every trading right, every trading privilege, was treated as an asset to keep to oneself, and only to be allowed to others upon some term over and above the natural benefit of the trade itself. Every trading right or privilege was always treated as a matter of barter. After the war England was still determined to maintain its unfortunate colonial system, which confined the trading of the colonies entirely to the mother-country. We would never have had that unhappy severance between the two portions of our Empire if it had not been that we insisted upon keeping the whole benefit of colonial trade to ourselves.

That was the spirit in which we bargained in 1818; and we would not give to the United States any trading privilege whatever. There was no sort or shadow of a trading right conferred upon the United States till long after this treaty. I think the first—speaking without my note I may not be quite exact in my memory—I think the first was given in 1830, when a right of trading was given to the United States with the West Indies. I was wrong. The only trading rights with the East Indies were given in 1794. In 1830, by an Order-in-Council, trading rights were conferred upon the United States with the British North American provinces. So that there were no trading rights in existence at all.

DR. DE SAVORNIN LOHMAN: But, Sir William, may I observe that I do not ask whether the Americans had a trading right, but  
1051 only whether the right was granted to them to exercise an industry; was the right given to the Americans only for their personal pleasure or to exercise an industry?

SIR W. ROBSON: Oh, yes.

DR. DE SAVORNIN LOHMAN: Is not that another thing, exercising a trading privilege?



SIR W. ROBSON: It is given for purposes of profit.

DR. DE SAVORNIN LOHMAN: Yes.

SIR W. ROBSON: But my observations, of course, all go to show this: how strictly limited was the sphere within which that profit may be made. The right that is given them is one which is carefully differentiated from an ordinary trading right. For instance, it is not the sort of right that would be given to a nation where we allow them to come and trade generally, or allow them to carry on a particular trade. We did not say that in the treaty of 1818; we did not say: "You may come and carry on the trade of fishing." We said: "You may come and catch fish which you may sell by way of trade." And, of course, for this purpose the distinction there is material. You may make a profit on the fish you sell; do what you like with them; but you shall not come here and treat your fishing right as if it were a trading right. That is the way I should put it. I think, perhaps, that is the clearest way of stating it. Your fishing right is not to be treated as a trading right. We will not let you buy your raw material, we will not let you buy your implements of trade—we will let you have nothing of that kind; we will give you a simple privilege of entry, fishing, and return.

THE PRESIDENT: That is an economic right.

SIR W. ROBSON: Yes, meaning a right to make money; that is all. In calling it a trading right or economic right, all these names are accurate in a sense, but they must be strictly limited to the right itself. I am jealous of the introduction of general terms not found in the treaty, lest, having got in your general term, there may be deductions drawn from it in excess of the words of the treaty itself. It is not an assistance, but it is, I think, a danger, when one has a case of difficult construction, to begin looking about for synonymous terms or equivalent terms. Because few terms are exactly equivalent and continually, in changing the term, one is importing, without knowing it, a new element which proceeds to be an element of confusion. For instance, the moment you get the word "trade" instead of the word "fish" there is a new idea brought into the grant, and they have to be carefully severed. They have to be watched and disassociated from the construction or they begin to be mischievous. That is why I think you cannot treat trade here as synonymous with fishing. All you can say is this: You have a right given to a person which he exercises in the way of a trade. You may say that he exercises it as a part of his trade; it is his subsistence; but he is not allowed, under that right, to exercise the whole of the trade. He is not allowed to exercise his trade in its general sense, because he is not allowed to use any implements that he chooses. Among the disabilities upon the exercise of his trade are those that I have just pointed out. When he is in his shop, buying and selling, he may not buy his raw mate-

rial, and the most important limitation of all, for it is the most clearly expressed, and which the circumstances show have been most vital as between the parties, is, he may not bring anybody whom he likes to assist him. He may only bring, to assist him in the carrying on of that portion of his trade which he is permitted to exercise there, persons of a particular class. Everything comes back to that. We are here discussing whom may you, the fisherman, employ. Call yourself a tradesman if you like, but you are not allowed here to exercise the whole of your trade. You are only allowed to exercise that part of it which consists in the taking of fish; and if you say you want someone to steer your boat, we say: "All right, get him, have someone to steer your boat, and have someone to dry your fish and do all the other things properly appurtenant to your trade. But remember, you are here under a special privilege, and you cannot let anybody else in who has not got the same privilege as yourself." That is the whole answer. You are confined to that.

SIR CHARLES FITZPATRICK: You say it is an industry to be exercised subject to certain restrictions. The purchase of bait, for instance, is prohibited, the purchase of seines is prohibited—things that  
1052 would be necessarily incident to the exercise of the trade; and you say that the employment of foreigners is prohibited in the same way, although it may be considered as necessarily incident?

SIR W. ROBSON: Yes, part of the trade.

SIR CHARLES FITZPATRICK: That is your point?

SIR W. ROBSON: That states my position, if Sir Charles will allow me just to make what may appear to be rather a fanciful verbal distinction. Instead of saying, as Sir Charles has said, an industry subject to restriction, he will forgive me if I say *part* of an industry is to be exercised, that is to say, the *taking* of the fish. I rather prefer that expression. One cannot be too careful about language, especially when you are not getting the last word. I feel that I don't quite know how, in the report, some of the phrases that I may use might, if detached, be made to tell against me, so I like to have it exact. For instance, I should not like to have it read against me that I had said it was an industry. Because that would give great scope to the ingenuity of the more than distinguished advocate and statesman who is going to take me in hand. And therefore I would rather have it exactly as I put it—not that it is an industry, but that it is part of an industry. It is an industrial right—perhaps that is how I should put it—it is an industrial right which is conferred upon a class of persons, and which they may exercise strictly according to the terms of their right. But however useful it may be to their industry as a whole that they may have this, that, and the other thing, the answer is: "No! we have not entitled you to exercise your industry as a whole; we have only given you a right useful to you, and necessary to you in the exercise of your industry."



DR. DRAGO: As you are not to have the last word, as you have just mentioned, perhaps it would be as well for you to take into consideration this aspect of the question:

The treaty says that the liberty of fishing is given to "inhabitants of the United States." Foreigners may be inhabitants of the United States; an alien may be an inhabitant of the United States; the only thing required by the treaty is for a man to live in the United States.

SIR W. ROBSON: Yes.

DR. DRAGO: Then there is another aspect to be considered. The treaty does not make any distinction as to natives or citizens of the United States. But a native of the United States, or a citizen of the United States, may be a non-inhabitant of the United States.

SIR W. ROBSON: Yes.

DR. DRAGO: He may live in Newfoundland, for instance.

SIR W. ROBSON: Yes.

DR. DRAGO: Or in Canada. Would he be allowed to fish?

SIR W. ROBSON: Well, I think if the question were raised as a point of law, in a particular case, he would not be allowed to fish. Of course it is not one that would be of much importance.

DR. DRAGO: I am not raising it as a point of law.

SIR W. ROBSON: No.

DR. DRAGO (continuing): Or as a puzzle or anything of that kind; but only to go into the intention of the negotiators. Were they in those days thinking of nationalities when they gave a liberty to "inhabitants of the United States"?

SIR W. ROBSON: I think, strictly speaking, that a native of the United States living elsewhere would not be allowed to fish, but at the same time that would be reverting again to the maxim that of little things the law takes no trouble—*de minimis non curat lex*. Of course, in effect, if a citizen of the United States found himself on a fishing boat but living in Nova Scotia or Newfoundland, nobody would dream of turning him out, because it would not be worth while. But strictly speaking on the terms of the treaty he could not.

THE PRESIDENT: Having in mind these two distinctions that an inhabitant of the United States may fish even if he is not a  
1053 citizen, and that a citizen of the United States may not fish if he is not an inhabitant of the United States—is not that proof that the intention of the parties was that the economic profit, the economic advantage of this fishery, should revert to the United States?

SIR W. ROBSON: Well, to inhabitants of the United States, that whoever lived there—I dare say it might be safe to say that it is intended to confer an advantage on the United States as a community, and I do not at all object to that way of putting it, as a community. Of course it is the United States.

THE PRESIDENT: One of the parties to the treaty.

SIR W. ROBSON: Although it is a privilege given to the United States as a community, it is, of course, a privilege which is conferred in effect upon a section of that community only; that is, those who follow the pursuit or trade of fishing—there I may admit the word “trade” quite freely; those who follow the trade of fishing are to benefit by the right, and if they live in the United States, that is accepted as a sufficient qualification for the enjoyment of the right, no matter where they were born, and no matter what their nationality; because at that time the United States was a very homogeneous community. Everyone here knows this, perhaps, better than I do—the extent to which foreigners had then settled in the United States. I think there were just the two great European communities represented, the Anglo-Saxon of course comprising the Scotch, English and Irish, and the French; I do not think the Germans had gone out there very much. So not much account was made, not much trouble or thought was taken with regard to other kinds of aliens. So that although these questions might arise, they were not of sufficient importance to require any special mention in the treaty. It is a right given with an easy and a simple test—that of inhabitancy—“Where do you live?” That is the question asked of the man. Of course if the question had been asked in those days “What is your citizenship?” I dare say a great many would have said: “I really don’t know whether I am English or American, or what I am—perhaps French.” But although a man might not be able to say what his citizenship was, at all events he was supposed to know where he lived; and it was taken as adequate if he lived in the United States. Of course it would in truth cover only those who were actually citizens of the United States. As a rule there is no doubt that a great many of the men on the American boats were Newfoundlanders. I believe at a later stage the Newfoundlanders numbered thousands on the American boats—a very good thing, too. England did not object to Newfoundlanders being on the American boats, as long as they were fishing and kept their allegiance, and were available for our fleets. Of course they were not on the American boats in 1818, but at a later stage they were, in the thirties and forties, and it was very serviceable to both countries, and England had no reason to object to such a thing as that. All we wanted was the allegiance of the men in case of national difficulties; and the men being required for our fleet, we did not care where they served; but we were most anxious, although it was unimportant to us where the Newfoundlander learned his seamanship, as long as he remained a citizen of Great Britain, that his place should not be filled by a Frenchman, or a member of any other community which might after-



ward be engaged in war, so that he might carry his experience into fleets hostile to ours.

[Thereupon at 12.2 P. M., the Tribunal took a recess until 2 o'clock, P. M.]

AFTERNOON SESSION, THURSDAY, JULY 28, 1910, 2 P. M.

THE ATTORNEY-GENERAL, SIR WILLIAM ROBSON (resuming): Dr. Drago has drawn attention to the fact that a "citizen" of the United States might be an inhabitant of some other place, and my learned friend Sir Robert Finlay makes on that the observation which I think useful, that the right was given to "inhabitants," rather than given to "citizens," because, after all, it was intended only for fishermen. The "citizen" might be an "inhabitant" or might live elsewhere. But, the persons in the minds of the framers of the treaty were the particular class of fishermen. And, one notices in the later treaties—I think in the treaty of 1854—I am not sure about 1871—also in that of 1871 I am reminded,—that the persons referred to as the beneficiaries under the treaty of 1818, that is the persons who are entitled to the benefit of the right, are called "fishermen." They are referred to not as "inhabitants of the United States," but as "American fishermen." That is the expression used. So that really it was persons who in the United States gained their living by taking fish. That has a useful bearing, like every circumstance, however small. If one happens to be right, everything is in one's favour.

The fishermen are referred to in a way which shows they were not thinking of the fishing trade generally.

For instance, a person might not, as I have already pointed out, buy his raw material there, he might not sell his fish there, no right is given to the fishing trade. The dealer in fish who lives in Gloucester and makes a living out of fish as merchandise, no benefit whatever is given to him. It is not the fishing trade of the United States that is made to receive any privilege. It is only a particular class of persons who in regard to their trade receive a limited advantage—in regard to a part of that trade. That is the whole measure of the right given. The fisherman, as I say, cannot sell a herring in the territory itself, has no such right. He can only catch his fish there.

And, I regard the taking of fish, perhaps I may not be expressing the same opinion as Sir Edward Grey expressed, but for my own part I respectfully submit (I am obliged to take the view which appears to me to be right), that I think all the persons on the ship engaged in fishing come within the definition of persons taking fish and must be inhabitants of the United States. Sir Edward Grey, in a diplomatic controversy, took rather a different view. Of course I am

now representing the Crown and giving it the benefit of such poor legal advice as I am able to give, and I must submit the view which seems to me to be correct.

I must now pass to the argument on this question which I am afraid I would have omitted but for the Tribunal directing my attention to it, and that is, the statutes cited by Mr. Elder in reference to, as he called it, the employment of foreigners.

I think he did not get quite the true intent of those statutes.

Of course England in 1818, as long previously, was a great maritime nation, with trade relations, even at that early date, in every part of the known world, and although she was anxious that her own citizens or natives should be trained in maritime pursuits, and to encourage the training of her own citizens in those pursuits, yet she could never put upon her ship-owners such a disadvantage as it would be to be able to employ only Englishmen, or only Britons. That would have been a fatal, or at least a very dangerous disadvantage to our ship-owners in trading in say the East Indies, especially where we had, owing to the very hot climate, to employ lascars and various Asiatic races who can stand better the heat of the engines and the stoke-rooms in the Red Sea, and so on. We are obliged to employ many foreigners upon our ships, and always, in different parts of the world, the British ship-owner has been allowed to employ some foreigners if he needed them. But, when our navigation laws prevailed (laws which I am now happy to say have been abrogated for the last forty or fifty years), they compelled our ship-owners to employ a certain proportion of British subjects, not always only British subjects, because then, as now, we differentiated a little. For instance, sometimes special privileges were given to English subjects as against Irish subjects. Here again one is referring to some of our historic mistakes, but they are not now to be criticised, because, after all, we are only dealing with their effect upon the construction of this treaty.

Sometimes we would say a certain proportion of your crew must be subjects of the King, and sometimes in other statutes we might say they must be English, giving a special advantage to England, but never, so far as I know, do we proceed so far as to say you shall not employ foreigners in the great commerce of England. You could not do it. You might find yourself in India or Asia with your crew depleted by various reasons on those long voyages, scurvy or what not, and you would be obliged to make up the complement of your crew by employing anyone you could get, but that did not mean that we encouraged the employment of foreigners. It did not even mean that we permitted it. It only meant that we did not prohibit it. We said to an Englishman, you must have three-fourths of your crew English, we want to make sure that you shall have that, and always



that. Sometimes the limitation was put on the vessel as it left the port, you must start with three-fourths. Sometimes it is more generally expressed that you must have three-fourths, which means that you must start perhaps with rather more.

Now, Mr. Elder, in the first statute he cited overlooked the fact I think that he was dealing with a statute which concerned the whole of our trade, and he drew attention to it. He said: "Here is a statute which says you may have three-fourths of the crew English, or rather three-fourths of the crew must be English," and 1055 from that he drew the inference that the other quarter may be foreigners, and therefore that foreigners were allowed to go freely into Newfoundland.

That was not an accurate inference when one looks at the statute. It is the statute of 1660. That is the one he referred to as giving the three-fourths proportion. It is on p. 514 of the British Case Appendix:—

"For the increase of shipping and encouragement of the navigation of this nation,"

There is the general policy expressed in the opening words:—

"wherein, under the good providence and protection of God, the wealth, safety and strength of this Kingdom is so much concerned; (2) Be it enacted by the King's Most Excellent Majesty, and by the Lords and Commons in this present Parliament assembled, and by the authority thereof, that from and after the first day of December, one thousand six hundred and sixty, and from thence forward, no goods or commodities whatsoever shall be imported into or exported out of any lands, islands, plantations or territories to His Majesty belonging or in his possession, or which may hereafter belong unto or be in possession of His Majesty, his heirs and successors, in Asia, Africa, or America,"

So that it is a purely general statute.

"in any other ship or ships, vessel or vessels whatsoever, but in such ships or vessels as be truly and without fraud belong only to the people of England or Ireland, Dominion of Wales or town of Berwick upon Tweed,"

It did not include the Scotch people. This is in 1660, and we had not got the Union then. It includes, oddly enough, this little town Berwick-upon-Tweed, which is just between England and Scotland, and which has preserved its status apparently as an independent territory. It is treated as if it were one of the Great Powers, but it is a little village down on the borders of the two kingdoms.

It is to apply only to people in these places—

"or of the built of and belonging to any of the said lands, islands, plantations or territories, as the proprietors and right owners thereof, and whereof the Master and three fourths of the Mariners at least are English;"

That is to say, there it is a crew not Scotch and not Irish. They must be three-fourths English. The other fourth may be what you like. Not necessarily foreigners. They might still be subjects of His Majesty. They might be from Scotland, although we had no union of Parliaments, yet we had a union of Crowns. It did not at all follow that because three-fourths must be English that therefore the other fourth should consist of persons not subjects of the King. But, for my purpose, I do not mind if they did, and I am not laying any stress on the fact that they might be Scotch, because they might also undoubtedly be foreigners. In dealing with our universal trade it would, as I have said, never do to say that you might not employ some foreigners.

Then it goes on in section 3:—

“And it is further enacted by the authority aforesaid, That no goods or commodities whatsoever, of the growth, production or manufacture of Africa, Asia or America, or of any part thereof, or which are described or laid down in the usual maps or cards of those places, be imported into England, Ireland, or Wales, Islands of Guernsey and Jersey, or town of Berwick upon Tweed, in any other ship or ships, vessel or vessels whatsoever, but in such as do truly and without fraud belong only to the people of England or Ireland, dominion of Wales, or town of Berwick upon Tweed,”

For instance, we would not allow the importation in ships that belong to Guernsey or Jersey. They spoke French there, and the privilege was not extended to them.

“and whereof the master, and three-fourths at least of the mariners are English;”

So that you might have your other fourth made up of persons, who, while subjects of the King, were not foreigners, or equally (I am not trying to suggest that foreigners might not be employed) you might employ foreigners. That is in the general trade of the kingdom. Mr. Elder rather took it, or read it in connection with Newfoundland, and rather left on one's mind the impression that he was applying it to Newfoundland, but of course it was a statute of much wider application; but no one has ever suggested, and I have not, that you might not employ foreigners on British ships for the purpose of British trade.

1056 Now, the next statute is one in 1699, at p. 525, British Case Appendix.

And here again, before reading this, it is necessary to draw attention to another condition of the times which is reflected in the clauses of this Statute, namely, that we had very often persons who were not subjects of the King, but were living in England, and engaged in seamanship. Seamen are rather a cosmopolitan class, as we have always in England a certain number of men of foreign



birth, and foreign speech, but who, nevertheless, find it convenient as seamen to live in England, where employment is often more easily obtained. Therefore you have aliens living in England as seamen, and by our legislation not always or necessarily excluded from service on our ships.

For instance, this statute of 1699 indicates that condition of things. It is perhaps a little inconsistent, but it is clear enough I think.

The statute begins again with a reference to the general policy of the State:—

“Whereas the trade”—

Now mark that, because this preamble to this statute has a great bearing on the question of fishing as an industry, and the distinction drawn here between catching fish and the trade of fishing is I think better put than I have stated it in my argument—

“Whereas the trade of and fishing at Newfoundland is a beneficial trade to this kingdom, not only in the employing great numbers of seamen and ships, and exporting and consuming great quantities of provisions and manufactures of this realm, whereby many tradesmen and poor artificers are kept at work, but also in bringing into this nation, by returns of the effects of the said fishery from other countries, great quantities of wine, oil, plate, iron, wool, and sundry other useful commodities,”

And so on.

“That from henceforth it shall and may be lawful for all His Majesty’s subjects residing within this his realm of England, or the dominions thereunto belonging, trading or that shall trade to Newfoundland, and the seas, rivers, lakes, creeks, harbours in or about Newfoundland, or any of the islands adjoining or adjacent thereunto, to have, use, and enjoy the free trade and traffic, and art of merchandise and fishery,”

Now there we are giving to our own subjects, not a mere right to catch fish only or to dry and cure them, but we are there giving them the whole industry, the free trade. You may buy your bait as you please, or your seines, and you may buy and sell. Traffic means buying and selling. Art, whatever else it may mean, means the faculty of doing. “Art of merchandise and fishery.” All these things you may do freely and without limitation—

“and enjoy, the freedom of taking bait and fishing in any of the rivers, lakes, creeks,”

And so on.

And then it goes on—

“and liberty to go on shore on any part of Newfoundland, or any of the said islands for the curing, salting, drying and husbanding of their fish,”

Now, the word “husbanding” of course is a very well known old-fashioned English word. You may catch your fish, you may dry

them, you may cure them, and then on the place where you find yourself you may husband your fish, that is, you may warehouse them, you may make a home for yourself. The warehouse man is the man who keeps his house together, and when you speak of husbanding a thing, you are making a home or a place for it until you desire to take it away and do something else with it. So that here are all these rights carefully given to those who trade there.

Now, then, at the end of that section comes this little reservation which is what I was going to draw attention to:—

“and that no alien or stranger whatsoever (not residing within the kingdom of England, dominion of Wales, or town of Berwick upon Tweed) shall at any time hereafter take any bait, or use any sort of trade or fishing whatsoever in Newfoundland, or in any of the said islands or places abovementioned.”

Now, that means surely that no alien is to have the privilege, and then comes this curious exception:—

“No alien . . . . not residing within . . . . Great Britain.”

1057 That is to say, if your alien resides in Great Britain, then apparently he is allowed to have the privilege. That looks as if it were intended here to safeguard the interests of those British masters who had been at Bristol and elsewhere accustomed to take on board their vessels seamen who, although not naturalised Englishmen, had become habituated or accustomed to sail in British ships.

Well, now, there is nothing there (and I have now read two statutes on which Mr. Elder relied) to show any kind of desire to permit, or encourage, or allow the introduction of foreigners to Newfoundland. Mind, I am not saying for an instant that if any fishing-boat had found it convenient to take foreigners on board, some proportion of them, anyone would have troubled to stop them at Newfoundland. Why should they? They were not afraid of it at that time. This is 1699, and we had not then begun our great European wars which carried us through the greater part of the eighteenth century; but, even then, and certainly later, if we had found our nursery, so to speak, the Newfoundland fishery, being occupied by foreigners so as to have any kind of effect upon our interests or upon the facilities for finding employment for Britons, who can doubt that we would have forbidden it? We did not forbid it because it was not worth our while, but we never allowed it, that is to say, we never allowed it in the sense of saying this is a thing you may do. We gave no liberty, we gave no right. It was not worth troubling about very much one way or the other in 1699. But, in 1818—I do not know whether that is the next step. There is a statute I see in 1775. We are getting then into what I may call the disturbed period (p. 543). It contains a bit of history which is rather useful. It is a statute which is intended to give bounties.



Again, the giving of bounties on the employment of British fishermen in Newfoundland does not look as if we would allow any considerable employment of foreigners. We may permit it for the convenience of our own fishermen, but it does not look as if we would allow it, and so we give a bounty, but the vessel must be British-built and three-fourths must be of His Majesty's subjects. You may take your one-fourth, it may be, from aliens. But, you find at Bristol, or on the eastern coast, at a place like Newcastle, there were always a fair number of men from the north-eastern countries, seamen and other men, anxious for employment. Three-fourths, according to this, must be British subjects before we give a bounty; but apparently not many foreigners found their way on to these boats, because it turned out that the rights which had previously been given to British subjects had been, as the statute says, enjoyed by them alone, and no others. The statute begins:—

“Whereas the fisheries carried on by His Majesty's subjects of Great Britain and of the British dominions in Europe have been found to be the best nurseries for able and experienced seamen, always ready to man the royal navy when occasions require; and it is therefore of the highest national importance to give all due encouragement to the said fisheries, and to endeavour to secure the annual return of the fishermen,”

And so on.

They were carried away by the allurements of the new country to which they went, and they sometimes stopped there, and we wanted them back.

Now, in order to promote these important purposes, and with a view in the first place of inducing His Majesty's subjects to proceed early from the ports of Great Britain to the Bank, and therefore to prosecute the fishery on the said banks to the greatest advantage, we wanted them to go, and we wanted them to be first. They had a long way to go.

Then it goes on to say they shall have the following bounty for British-owned and British-built ships; and then there is this important qualification. It only provides that three-fourths of the men must be British subjects, and Mr. Elder draws attention to that, but see how it goes on: The ships must be British and owned by His Majesty's subjects residing in Great Britain:—

“or Ireland, or the Islands of Guernsey, Jersey, or Man; and be of the burthen of fifty tons or upwards, and navigated with not less than fifteen men each, three-fourths of whom, besides the master, shall be His Majesty's subjects; and in other respects qualified, and subject to the same rules and restrictions, as are described”—

by the Act of 1699, which I have just read—

“and shall be fitted and cleared out from some port in Great Britain”

Now, that is a very fair way of insuring that you shall have all of them, either citizens of Great Britain, or persons who, although  
 1058 not actually naturalised in Great Britain, are nevertheless living there, finding their employment there, and going to enrich our mercantile marine with seamen who may be valuable afterwards for the navy. I am afraid, in those days, when maritime troubles or naval wars came on, we were not very particular about the nationality of those whom we impressed, but still we did not want those, of course, who could not be trusted to fight in our interests, so we did not discourage the system of foreign seamen in England, if it was found convenient for their employment. So that you see here where we say three-fourths of them must be British subjects, we did not say the other fourth may be foreigners. We do not forbid the employment of foreigners, because that would be in particular cases to handicap an industry. But, we say each vessel must be fitted out at a British port, and you are not likely at a British port to get any foreigners, except those who are inhabitants or domiciled in England. So that in these three statutes you do not, as Mr. Elder thinks he does, get a course of trade. You get no indication that foreigners were regularly employed. None.

All you get is—not a permission to employ them, but an insistence and command to employ at least three-fourth of them English, and the remainder are likely to be English, because they are fitted out at English ports, so the chances are that they will all be either English, or English in sympathy, or perhaps in speech. But you do not get a single statute here to say that foreigners are free to operate under the British flag in British territory or British fisheries. You get nothing of that kind. And that is what Mr. Elder wants to prove. He wants to show, of course, that in 1818, when there is a right given to take fish—that according to the custom of that time that right was exercised, not by Britons for themselves alone, but by Britons employing foreigners. Well, he does not show it. He does show this, that according to the law in Asia and in Africa and in different parts of the world, Britons were allowed to employ on their ships a certain proportion of foreigners. But, when it comes to Newfoundland, then you come across a law which I shall read directly, forbidding aliens in Newfoundland, forbidding them altogether. As soon as you get to close quarters in Newfoundland, near the treaty, you find aliens being forbidden.

In 1819, for instance, there is a statute, which I read this morning, which says no alien shall be employed unless he has a treaty right.

In 1824 the same thing is repeated, no alien shall be employed in Newfoundland unless he has a treaty right.

So that when we get to the quarter which is really important, to the material and important place, we find Great Britain legislating



against aliens, saying we will not have them. Prior to that we do not find any legislation in their favour. All we find is that our ship-masters are allowed a certain latitude of employment, not necessarily in Newfoundland, but in different parts of the world.

In 1699 they are allowed that latitude of employment in reference to Newfoundland, but in that statute, the only statute in which Mr. Elder can get near his point, in that statute again they say there shall not be foreigners, because they say you shall only have the bounty if the ship is fitted out in an English port where you are not likely to get foreigners. So that when one looks at the legislation it is as clear as daylight that there is no encouragement or permission on the part of England at all, and I think I was justified in what I was saying this morning. I said it without having these statutes in mind at the moment. I think I was justified in what I said—I was speaking simply upon the general policy of England, which is known to us all—that it would be impossible to show that foreigners were employed in any sense which indicated a right to employ them, or which indicated that they were employed so generally and universally as to give rise to the contention that the treaty was made on the basis that the United States may go on employing them.

That is Mr. Elder's point, and he cannot establish that point at all. Let us be careful again how we talk about employing non-inhabitants. Nova Scotians were, of course, employed very largely. Other colonists would be employed very largely, and have been since, but there is no evidence of any employment of aliens generally. Why should there be? Again I ask the Tribunal to consider who were the persons who were supposed to have employed them, these Gloucester fishermen. They wanted all the employment themselves. They were in these little schooners, fifteen or twenty men together, and they scarcely recruited the world for foreigners. We, in our English boats, did come across foreigners whom we took regularly into our service. We scoured the world, our ships were in the Scandinavian, Norwegian, and the Baltic ports, and they very frequently took on a seaman, kept him, or employed him, as men were employed in those days, for long periods of time. Under the old system of bonds you had seamen engaging for three or four years at a time. But  
1059 the little schooners and fishing-vessels going out from Gloucester and Massachusetts were not ships of that kind. They were not likely to pick up foreigners in cruises around the world, and therefore they probably engaged only their own people.

When one carries the statutes, as I have done, down to 1824, and when one gets at close quarters with Newfoundland legislation, one has nothing that indicates that foreigners might be employed, or in fact were employed. The statute of 1775 is one bit of evidence worth

giving. It is at p. 544 of the British Case Appendix, and it is in regard to the right of drying fish. Section 4:—

“And in order to obviate any doubts that have arisen, or may arise, to whom the privilege or right of drying fish on the shores of *Newfoundland* does or shall belong, under the before mentioned Act,”—

The Act of 1699 which I have read—

“which right or privilege has hitherto only been enjoyed by His Majesty’s subjects of *Great Britain*, and the other *British* dominions in *Europe*,”

Even colonists had not enjoyed the right of drying fish on the shores of Newfoundland. The first statute was passed in 1699. We are here, in 1775, seventy-six years afterwards, and, during all those seventy-six years, the right of drying fish on the coast of Newfoundland had been enjoyed only by British subjects. There had been no inshore fishing during that time. I dealt with that point on the other question. They had had no inshore fishing rights at this place; they had been fishing on the banks, and whether they employed foreigners or not, it does not matter to me. The treaty of 1783 was made only eight years after the amending statute of 1775 was passed, which declared that only British subjects had enjoyed this privilege. So, I think, I have made good the proposition that I laid down this morning, that there is no foundation for suggesting that in 1818, when this privilege was given the conditions of the fishing industry were such that the grantees, the inhabitants of the United States, were entitled to expect that they would be allowed to employ foreigners.

When one looks at the conditions it is obvious that they were not such, and that they were opposed to any such right. Even if they had been granted the full rights attaching to the fishing industry, if, instead of a mere liberty to take fish, they had been told in express terms: You have a right to pursue the merchandise and trade and art of fishing, with all its mercantile accompaniments in those waters, they still could not have said that the industry imported or meant that it could be carried on with the aid of foreigners. No such practice is apparent in the documents or in the evidence.

But, of course, as we know, it was not such a grant as that. It was not a right to carry on the whole trade of fishing. It was a strictly limited portion of that right, given perhaps grudgingly, given because a strong appeal was made by the United States Commissioners on personal grounds; that is to say, on behalf of a meritorious class whose livelihood was placed in peril; and then, just one part of the trade was enfranchised, so to speak; that is the mere act of catching. We will not let you do anything else; you shall not pursue your trade; you shall not buy or sell; one thing you shall not do is to



take anyone else there, because this is a privilege given to you because of your situation and character and class, and it is not to be given to anybody else. It is right of entry into our territory for a particular purpose, limited to a particular class, and you cannot extend either the class or the right. It is on this ground that I venture to put it. I dare say that I speak with a degree of confidence not becoming to an advocate, but I can see only one answer to this question. Let me take it a little farther.

THE PRESIDENT: You have drawn our attention to the statute of 1819, which forbids the employment of foreigners, and you mentioned the exception in favour of treaty rights. That is, I presume, the proviso of section 2 of the statute of 1819?

SIR W. ROBSON: Yes.

THE PRESIDENT: But the terminology of this proviso is somewhat curious. It says:—

“Provided that nothing in this Act contained shall apply, or be construed to apply, to the ships or subjects of any Prince, Power, or State in amity with His Majesty, who are entitled by treaty with His Majesty to any privilege”——

&c. That is the first time that I have noticed the mention of ships in connection with these treaties. An exception is made not only  
1060 in favour of subjects of States which have treaty rights, but also in favour of the ships of States which have treaty rights.

SIR W. ROBSON: Well, that is apparent from what precedes in the clause. This is a clause dealing with the forfeiture of ships and it is in that way that ships are referred to. If we look at the whole clause we will see that it relates to natural-born subjects. It says:—

“any person or persons, not being a natural-born subject of His Majesty, in any foreign ship, vessel or boat, nor for any person in any ship, vessel or boat, other than such as shall be navigated according to the laws of the United Kingdom of *Great Britain and Ireland*, to fish”——

And then it goes on—

“and that if any such foreign ship, vessel or boat, or any persons on board thereof, shall be found fishing,”——

this vessel is to be forfeited. Now, as they have dealt there with both persons and ships, irrespective of nationality, they say we must save both persons and ships, so that the proviso saves persons from penalties and ships from forfeiture, but does not use the word “ship” so as to give any right to a ship that would not be enjoyed by a person.

THE PRESIDENT: That might be an explanation.

SIR W. ROBSON: I would like to read—although I know it is in the mind of the Tribunal, but I cannot resist the temptation, as I

set out to read it some time ago—a passage from a letter of Mr. Adams. It is a strong appeal, and has an important bearing upon any attempt to extend the right. If the United States come before this Tribunal and say: Look at the circumstances of the case. Is it fair, is it equitable, is it in accordance with the intent of the parties that we should not be allowed to employ foreigners, leaving the documents aside and looking at the business of the thing? I reply: Let us look at the intent of the parties as declared and disclosed by contemporary evidence. Mr. Adams put it very strongly, and I think I am justified in saying that his appeal must have had some effect. I want to show that it was not, as Mr. Elder has said, the millionaire fisherman that Mr. Adams was fighting for, but that it was the hardy working fisherman. He says that:—

“Independent of the question of rigorous right, it would conduce to the substantial interests of Great Britain herself, as well as to the observance of those principles of benevolence and humanity which it is the highest glory of a great and powerful nation to respect, to leave to the American fishermen the participation of those benefits which the bounty of nature has thus spread before them; which are so necessary to their comfort and subsistence”——

It is purely an appeal for individuals. All this talk about a grant made to the State never enters anybody's head when they are making the treaty—

“which they have constantly enjoyed hitherto; and which, far from operating as an injury to Great Britain, had the ultimate result of pouring into her lap a great portion of the profits of their hardy and laborious industry; that these fisheries afforded the means of subsistence to a numerous class of people in the United States, whose habit of life had been fashioned to no other occupation, and whose fortunes had allotted them no other possession; that to another, and, perhaps, equally numerous class of our citizens, they afforded the means of remittance and payment for the productions of British industry and ingenuity, imported from the manufactures of this United Kingdom; that, by the common and received usages among civilized nations, fishermen were among those classes of human society whose occupations, contributing to the general benefit and welfare of the species, were entitled to a more than ordinary share of protection; that it was usual to spare and exempt them even from the most exasperated conflicts of national hostility; that this nation had, for ages, permitted the fishermen of another country to frequent and fish upon the coasts of this island”——

Then he went on to show the economic advantages of mutual trade. Clearly the request for the right is put upon considerations which relate to individuals, and individuals alone; so that, when one goes outside the treaty and begins to see what there is in the conditions or in the contemporary documents which might encourage or allow an extension of that right, instead of finding matter which allows



such an extension you find matter which evidently shows that it was a personal benefit, and intended to be personally enjoyed by those in whose favour it is granted. Then he says this at the end:—

1061 “By attributing to motives derived from such sources as these the recognition of these liberties by His Majesty’s Government in the treaty of 1783, it would be traced to an origin certainly more conformable to the fact, and surely more honourable to Great Britain, than by ascribing it to the improvident grant of an unrequited privilege, or to a concession extorted from the humiliating compliance of necessity.

“In repeating, with earnestness, all these suggestions, it is with the hope that from some, or all of them, His Majesty’s Government will conclude the justice and expediency of leaving the North American fisheries in the state in which they have heretofore constantly existed.”

Here you have, as the reason urged by Mr. Adams, the benefit to individuals and to individuals of a peculiarly meritorious class. That is all; nothing else than that, because, at this time, Great Britain was certainly under no pressure. She was at the zenith of her triumph, and she was certainly under no humiliating conditions or in a situation which compelled compliance with humiliating conditions. She was not under any necessity to consent to give a right which might have the effect of depleting those fisheries if ever the United States chose to exercise its right in a hostile spirit against its neighbour. The interpretation which the United States seek to place upon this right might have the effect of depleting the fisheries upon which Newfoundland depends for its very existence. Just think of it. Look at it from those considerations of fairness as between the nations. We gave a grant in 1818 to a nation of, I think, about 3,000,000 inhabitants. I do not know what the American population then was, and I may not be correct in that statement, but it was probably something like 3,000,000. We gave it to thirteen States, and we gave it to them under the title of the United States. These thirteen States have become nearly fifty, and the 3,000,000 have become nearly 80,000,000. A benefit which we conferred upon a single class of United States inhabitants is now a benefit which extends to the greatest population of almost any State in the world, except Russia and China, certainly to a population which, in point of power, prosperity, and potential greatness, is unmatched in the world. There is an increase of population to an enormous extent, and a grant given to the 3,000,000 people is now to be enjoyed by over 80,000,000. I am not saying that as a matter of law points of law might not be raised upon it, but they are not raised here. I think that if we were of Senator Turner’s way of thinking about servitudes I might say that the servitude might not attach to the dominant tenement in its increased extent, but, however, I do not

take that point of view. I say that you have got, by the expansion of this Republic, 80,000,000 of people enjoying that right. Nobody could foresee that. Nobody would have believed it, but we have to take the consequences of it. We have to take the consequences of having made a grant to 3,000,000 which is now enjoyed by 80,000,000. A food demand which might be easily met by a single class in 1818 now calls for enormous supplies. The United States has a daily and continually increasing demand for fish which must be supplied. Just think of laying a burden like that upon Newfoundland. Looking at the case only on the merits, and, considering the circumstances and conditions, can you fairly say that such a construction ought to be given to this treaty as not only these 80,000,000 should enjoy it, but that corporations or men who put their capital into this industry may call in men from Asia if they like to carry it on? We are entitled to look at the future. At this present time the price of labour in the United States makes it difficult for them to carry on this fishery. I do not know about figures, but I should not be surprised to learn that, in so far as the American fisherman is concerned, the number employed is a diminishing number, and that they no longer need this right for the purpose for which Mr. Adams asked it. They have those great domestic industries on such a scale, and paying so high a wage, that it is not easy for them to get men to undertake the laborious and, I am afraid, the less-paid task of fishing, but their population is still growing by leaps and bounds, and their food supply is a matter of absolute importance.

If they allow free and open trade to Newfoundland it does not matter who gets the food, but supposing they do not adopt that policy of free and open trade, a policy which, no doubt, would make Newfoundland rejoice in the prosperity of the United States, supposing they say, as according to the present indications they will say: We are going to exercise this right and we are going to keep it to ourselves, the enormous increase in the burden which has been put upon Newfoundland we will stand by, we are going to keep this right for 80,000,000 and we will not even give Newfoundland a market for a herring in the United States; we will keep it to ourselves, you shall be shut out of our market, but you cannot shut us out of your territory and we may employ whom we please; all we have to do is to get some wealthy capitalist, some man who cares to run fishing upon a great scale, like an oil trust, or Heaven knows what else, and  
 1062 he may employ any number of Japanese, or any number of Asiatics,—what then would be the position of Newfoundland, unable to enjoy the greatness of a market which is at its door and unable to prevent this enormous influx, it may be, of Asiatics, whom it does not desire but whom it will be unable to keep out?



Some of the States of America have legislated in a sense very adverse to other races. They have done so from a feeling which no one is entitled to criticise; they have done so from a feeling of racial self-preservation, but we are not to do it in so far as our fishing industry is concerned in Newfoundland. That is our one industry; we have nothing else, no olive groves and vineyards, no smiling pastures with cattle roaming over them; we have nothing of that kind, nothing but these stormy seas with their hard-won cod-fish; but we are to see our waters crowded with aliens upon a strained construction of this treaty which nobody ever thought of until these recent controversies arose, we are to have no right to turn the key in our own front door, we cannot lock our own front door against those persons who may be brought to engage in this business.

These contingencies would not be of any great importance if there had been prevailing between Newfoundland and the United States that peaceful and harmonious condition that one would like to see, but they got to quarrelling about taxes and they got to quarrelling about their markets. The United States say: Our policy is to keep our market to ourselves; so she put on this tax, I forget of how many cents, but I think 40 or 50 cents, a quintal on fish, which keeps fish out. Newfoundland says: Very well, we will adopt the same policy with reference to our bait. And they have that fight going on quite outside this treaty. This treaty does not touch it, although it may be adversely affected if either party steps beyond its proper limits. So they have had a fight, and we do not know when these nations will adopt a policy which will preclude the possibility of a repetition of such conflicts. They may go on for another hundred years, and if so I think it is the duty, or it is the right, of Newfoundland to stand by its treaty and say: We have but one industry, we live on that, we have a population of between 200,000 and 300,000 people who live on this industry, we cannot afford the fiscal policy prevailing to the south of us shutting us out from our natural markets, and we cannot afford to have our waters crowded with anybody who may be in the employ of the United States. The difficulty is, upon the contention of the United States, that they can man every ship with Asiatics, and if a fight arose, if a quarrel arose who can say that that all-powerful weapon might not be used in the hands of the United States. No one could complain of it, they will have the right and they will say: We are going on international law, we have the American flag and we have one American on each boat—perhaps none. They might fill the whole ship with any sort of persons the master chose and employ them fishing in British North American waters.

That is the situation of Newfoundland, and if I appear to argue, as I am afraid I may, with some undue insistence upon this point, it is because I must look forward to and recognise the great danger to

the prosperity of Newfoundland, a danger which may be fatal to its separate existence. It is a very small State. It has had self-government only since 1834, and, of course, it has had many of the struggles of a small State.

It is, like other small States, very often distinguished for the exuberance of its patriotism, but this little island, nevertheless, in the view of Sir Robert Bond, is the mistress of the northern seas when it comes to selling bait. In other spheres of action and policy he would allow it some simpler part, but when it comes to selling bait it is the mistress of the northern seas, a position of which they are naturally proud. This natural advantage which enabled them to say, "I will sell my bait," or "I will withhold my bait," was carefully preserved at the time of the treaty. Is she now to lose it, under one question or another, and along with it, to lose the power of securing to her own citizens the right to engage in their own industry to the exclusion of anybody else? That is the point. There is not the ability to engage labour for this trade in the United States because they cannot pay the proper wage to bring men there and they desire the right to employ cheaper labour and they want to get that right under this treaty. But there stands against them the word "inhabitants." It is the only word there is between Newfoundland and a stream of cheap labour which may or may not be Asiatic, which will undersell the whole of her citizens and ruin her industry.

So there is much more in all this than a mere quarrel about words. It must be considered with relation to that most unfortunate conflict which arose on this question between Newfoundland and its colossal neighbour.

I have now taken up so much time that I am almost afraid  
1063 to pass to the propositions laid down by Mr. Root, but I hope the Tribunal will forgive me if I have been so long on this question, and give me yet a few minutes more in order to deal with this last part of the case to which I shall draw attention. Mr. Root wrote a letter in which he set forth with great clearness the position of the United States, and I would like to say just a few words about it. It is in the British Case Appendix, at p. 492. He put his first proposition thus:—

"1. Any American vessel is entitled to go into the waters of the Treaty Coast and take fish of any kind."

Well, now, could one have a better illustration of a dangerous method of making an interpretation than this?

The word "inhabitant" is out and the word "vessel" is substituted. Why? Because an inhabitant can only fish in a vessel. Just mark the steps of the reasoning which lie latent in that proposition and in those which follow. The right is to fish. It is not to fish on the shore, but to fish in the water, and on the water. Therefore we must



go there in a vessel. Therefore the right is given to a vessel; and if you must fish in a vessel, and the right is given to a vessel, that means you can put anybody you like on board the vessel, and he will have the right to fish. That is the use, the meaning, to which that proposition is to be applied. There is not a step in the reasoning which, of course, will hold good. The vessel is the mere thing that carries the inhabitant. It has no rights. Mr. Root himself says later on that he is only using the word "vessel" and the rights of the vessel as a convenient way of indicating the rights of the master; and, of course, it is a convenient way. We always speak of a vessel as a sort of person. The seaman does more than talk of it as a person. He indicates it by the sex, which is to him an object of continual interest. He says: "She does this" or "She does the other thing." But that does not mean anything more than the rights of the master. And if that is all that Mr. Root means by referring to the vessel—the right of the master—I respectfully submit that it is better he should say so. But the moment he begins to say so the whole fabric of his argument goes; because if you simply say an American master is entitled to go with other American inhabitants into the treaty waters and fish, we are all agreed.

Next, having got his vessel treated as if it were the person entitled to receive the benefits, he goes on—I need not read the second paragraph, because that refers to Question 1:—

"An American vessel seeking to exercise the treaty right is not bound to obtain a licence from the Government of Newfoundland, and, if she does not purpose to trade as well as fish, she is not bound to enter at any Newfoundland custom-house."

Nobody says she is bound to obtain a license from the Government of Newfoundland. I never heard anybody contend that she was. The Government of Newfoundland has nothing to do with the vessel. It is the inhabitants that it has to do with. They may come in a vessel of any kind they please, licensed or unlicensed. We cannot keep them out if they are simply going to fish under the treaty. We can keep them out if they if they are going to trade. But Mr. Root is laying down a proposition there as if he were controverting some proposition of ours. Not at all. We do not say that the vessel is bound to obtain a licence.

The next one is:—

"The only concern of the Government of Newfoundland with such a vessel"—

We have got away from the inhabitant now, but still I mean to keep him in. I mean to follow this vessel up in each of these propositions with its proper equivalent term—"inhabitant":—

"The only concern of the Government of Newfoundland with such a vessel is to call for proper evidence that she is an American vessel, and, therefore, entitled to exercise the treaty right,"

We have never had any difficulty about deciding whether she is an American vessel or not. That has not been the difficulty, and I do not anticipate that we shall have any. If a vessel comes and produces her register and her papers, and we are satisfied that she is American, that is quite enough for us. At least I should say so. I may be speaking here without knowledge of some acts on the part of Newfoundland, which are not present to my mind at the moment; but anyhow, as far as Great Britain is concerned, we say: "By all 1064 means come; show us your papers. You are an American vessel. Pass on." That has nothing to do with this argument as to whether that American vessel is entitled to carry a crew of foreigners or not. That is the point. And the moment you substitute the word "master" for the word "vessel," which Mr. Root says we may, then the proposition becomes perfectly harmless. We none of us disagree with him. We all agree.

Then, the next is the question about the vessel's national character:—

"When a vessel has produced papers showing that she is an American vessel, the officials of Newfoundland have no concern with the character or extent of the privileges accorded to such a vessel by the Government of the United States. No question as between a registry and licence is a proper subject for their consideration. They are not charged with enforcing any laws or regulations of the United States. As to them, if the vessel is American she has the Treaty right, and they are not at liberty to deny it.

"If any such matter were a proper subject for the consideration of the officials of Newfoundland, the statement of this Department that vessels bearing an American Registry are entitled to exercise the Treaty right should be taken by such officials as conclusive."

What does it all mean? What is the purport of all these observations about an American vessel? The object of it is not to treat "vessel" as though it were an equivalent term for "master," though Mr. Root says that is all it is. The object is to get the idea of the master, who is an inhabitant, out of our heads, and having got that idea out of our heads, and put a vessel in its place, then it follows easily that a vessel means something with a crew, and a crew may mean Japanese, Chinamen, Newfoundlanders, Nova Scotians—anybody you like. And there is your treaty gone.

That is the object of the six propositions, and they are all seen to be inapplicable when you come back to your treaty, and see the treaty does not talk about vessels. It talks about inhabitants. You may come in any vessel you like. You may swim, if you please. You may come as you like, but you must be an inhabitant. If you say that you cannot do your work by yourself and must have people and servants with you, then you must get more inhabitants. That is all. And if you say then: "I want to bring a foreigner," and come with your vessel to my 3-mile limit, you find there you are faced by my



national and sovereign right which I have not parted with. In the argument on Question 1, we saw clearly enough that the sovereign right is a thing which can only be lost by express and explicit grant. There has been no such grant. And I say therefore: "You are not entitled to bring them in."

With regard to the position of inhabitants of Newfoundland, there again I express my respectful astonishment that the United States should even imagine anything has happened to deprive Newfoundland of its jurisdiction over its own citizens. Newfoundland has a perfect right, an undoubted right, to say to its own citizens: "You shall not take service upon an American ship."

There may be different opinions as to the wisdom of such a course, as to the prudence of a small State throwing down, even in a purely fiscal fight, such a challenge to a great republic like the United States; but we are not here to teach wisdom, or preach wisdom to governments. All we have to do is to say, if they are going to quarrel, what are the weapons they may use. We cannot take away from the United States the right to close its markets; neither can we take away from Newfoundland the right to close its ports. We cannot exercise jurisdiction over inhabitants of the American Republic. On the other hand, we have no right to take away one jot or tittle of the jurisdiction which Newfoundland, as a self-governing State, claims to exercise over its own citizens.

I do not understand it to be disputed that Newfoundland has that right. I suppose it will not be contended that the Americans, because they are entitled to bring in foreigners, in their view, are entitled to bring in races excluded by treaty. After the Treaty of Utrecht we would not allow the French to come in. They had no treaty rights there. At considerable cost in various material assets, France was content to forego her rights upon the western coast, or at least to forego a very substantial portion of them. It is open to the United States to go round to France and say: "You have given up your rights, or most of them, on the west coast, but we can let you in. All you have to do is to let your seamen be employed in our boats, and we will give you all the benefit that you got, as a training ground for your navy." France would say: "Well, Newfoundland never paid us. Never." They had to give bounties to keep their fishermen going there. And that was one of the things that Sir Robert Bond, quite properly, most properly, tried to avoid. He was absolutely entitled to do it, and justified in doing it, in trying to save his own fishermen from the consequences of the aggressive bounty system that had been adopted by France. And now, appar-  
1065 ently, France having given all these benefits in order to get a training ground for its seamen, pays nothing to make a bargain with the United States by which it shall retain all these privileges,

not even paying a bounty; because, the United States fishing masters are anxious for men. Apparently they do not seem willing to pay the high rates necessary to get United States citizens, and I dare say they would be very glad to get men from the French coast to enlist there, who would be thereby able to get all the advantages which they have given up by treaty. Can that be intended? And yet that is the result of the United States contention. That is the effect of it. That is the thing which will happen on the first breath of difficulty, on the first friction between Newfoundland and the United States.

I repeat my apology for the length to which I have gone in this question—much farther than I intended to go. I thought I should have finished well before 12 o'clock. I am sorry that I have taken so long a time over it.

THE PRESIDENT: May I apologise for another question still: Would it be possible to draw a distinction between a special prohibition against employing foreigners of all nations in the fishing industry of the United States, and, on the other hand, a general prohibition against foreigners of a determined nationality, based on general economic principles, militating against underselling natives in wages?

SIR W. ROBSON: It would be very difficult, Sir. I can scarcely imagine how such a provision could be framed.

THE PRESIDENT: If, for instance, Newfoundland would forbid the Chinese every industry: Would this prohibition, possibly, apply also to the fishing industry, and would it be possible to make such a prohibition, whereas it would not be possible to prohibit foreigners of all nations to enter this specific industry of fishing? On the one side I suppose the case of a special prohibition against the employment of foreigners of all nations in this determined fishing industry, and on the other side I suppose a general prohibition against persons of a certain nationality, based on general principle—not applying to the fishing industry, but to all industry generally.

SIR W. ROBSON: I take the two cases that you have been good enough, Sir, to suggest: An enactment, say, by Newfoundland, which should forbid persons of any nationality, other than the treaty nationality, to be employed in this industry?

THE PRESIDENT: Yes.

SIR W. ROBSON: Or, on the other hand, a statute which should forbid particular nationalities—one does not like to be invidious—but, say, persons of Asiatic nationality—

THE PRESIDENT: Yes.

SIR W. ROBSON:—from being employed at all?

THE PRESIDENT: Yes.

SIR W. ROBSON: Do I understand that your question is: Whether it would be possible for Newfoundland to undertake one of those prohibitions without the other?



THE PRESIDENT: Yes; and to say that provisions of the second order would not be a breach of the treaty, whereas the provision of the first order would be a breach of the treaty.

SIR W. ROBSON: Yes. The provision of the first order being that a particular nationality is——

THE PRESIDENT: That all nationalities are forbidden to enter the fishing industry of the United States.

SIR W. ROBSON: Yes. That, of course, would clearly be a breach of the treaty for it would include in the prohibition the employment of Americans by Americans. But supposing that you had a provision applicable to a particular nationality—let us say a Malay, or a subject of one of the smaller States that is not likely to trouble us if they are afterwards offended—suppose we say that the subject of the Malay State is forbidden to be employed in any industry: If he was forbidden to be employed in the territory of Newfoundland, and nevertheless were employed to fish, I cannot imagine how that would be other than a breach of Newfoundland law. It must be; because

the generality of the prohibition does not admit of gaps or  
1066 loopholes, as you may say—places through which the foreigner may come. The Malay is told that he may not be employed in that territory. Now, if he may not be employed in that territory, and the United States master comes along and says: “I am going to employ him, and bring him, because it suits me, and helps me in the exercise of my right,” why, in that case, there is a clear breach of the law of Newfoundland, first by the Malay, who knows he has no right to come, and secondly by the United States master, who knows he has no right to bring him.

In either case, taking either of those propositions, a breach of either prohibition absolutely destroys and denies the self-government of Newfoundland. There is no way out of it. It could not make either prohibition except on some principle which entitles it to make both. The first prohibition, which is against the subjects of all States, other than those which have treaty rights, from taking part in the fishery, is made by what right? By what right does Newfoundland make such a stipulation? Only by virtue of its sovereign right, by virtue of its right of exclusion, which is the same in substance as the *droit de renvoi* of which Mr. Halleck talked this morning—the right to exclude either when they are coming in or after they have come in. That is the basis of such a right.

Now, take the second prohibition, which is that of a particular State being forbidden to indulge in any industry. That prohibition, again, can only be justified on the same principle of international law, the *droit de renvoi*, the right to say: “You shall not come in.” It is exactly the same principle that justifies either prohibition; and either prohibition is essential to the independence of the State.

For instance, if an affirmative answer were given to this question: "Have the inhabitants of the United States a right to bring foreigners into the territory?—because that is this question—"Have they a right to bring foreigners into this territory, under a contract of employment?"—

JUDGE GRAY: "Non-inhabitants," you mean?

SIR W. ROBSON: Well, have inhabitants a right to bring in foreigners? That is the question.

JUDGE GRAY: I beg pardon; there is a little distinction—

SIR W. ROBSON: "Non-inhabitants"; yes. I am much obliged. But of course it includes foreigners. The "non-inhabitants" include "foreigners," so I am omitting, for the purpose of brevity, the other non-inhabitants of the United States, and am taking this question as applying to foreigners, as it clearly includes foreigners.

This question may be read in this way, and must be read in this way, subject to the little saving clause pointed out by Mr. Justice Gray:—

"Have inhabitants of the United States a right to bring into Newfoundland foreigners who are excluded by treaty, or by statute,"

or foreigners at all—I need not add that about the statute. Have they a right to bring foreigners into this territory?

Mr. Root says: "I want 'yes' to that." I say here again in this question, as in all the other seven that are laid before this Tribunal: at the root of them all is this question of national independence and sovereign right.

I am quite sure that the United States, the great republic, with the generosity of temperament that great States ought to cultivate, and indeed generally do acquire as imperial responsibilities are laid upon their shoulders, would not like to have it thought that they were seeking to obtain anything to which they are not entitled.

As a matter of fact, what they are doing (whether they realise the effect of it or not I do not know), in each of these questions, is practically not merely claiming a right, but extending a right so as to diminish, and most substantially, the sovereignty of Newfoundland.

They are now claiming to say: "You have not merely limited your sovereignty by letting us in, but you have opened a door which you cannot close against anybody, if anybody comes in with us. We have a right to let any foreigner we please enter your territory under our flag." That is the United States claim.

THE PRESIDENT: I ask only to see the consequences of the British contention—for no other purpose. According to the British contention, would not a law prohibiting the employment of, say, Malayan labourers in general, in every sort of industry, enter into letter B of the first question—"regulation desirable on grounds of public order and morals?" Could it not be said to be desirable



on grounds of public order that people underselling the wages generally should be excluded from all sorts of industry?

SIR W. ROBSON: I should not like to put it on that ground, Sir. I should not like to say to anybody, to the most humble State in the most backward part of the world: "I am keeping you out on the grounds of public order and morals."

THE PRESIDENT: I would not speak of morals—but on grounds of public order.

SIR W. ROBSON: The best thing is to be in a position to tell the truth in such a case. The real truth would be: "We do not want you." It would not be on grounds of public order. There would be no question of public order. Some of the excluded races are excluded because they are so orderly. That is why we exclude some of them. For instance, take the humble Briton who wants his linen well washed. He may very well have to leave persons of his own colour in order to find a really efficient laundress or laundryman, and when the laundryman is told that he may not come in, it is not because he is a disorderly person; it is because he washes so well and washes so cheaply.

I should not like to force Newfoundland into the position of unreal or evasive excuses. I do not think a nation should be compelled to give any excuse. If it chooses to say: "I won't have foreigners of a particular class," it should be allowed to say so, without reasons. It is much better that it should. It is bad enough to be excluded from a friendly territory, or a neighbour's house, but I would rather be told shortly and merely that I am excluded from my neighbour's house than be told why. I think, on the whole, that if he is to exercise his sovereign rights he had better exercise them as sovereign rights, without any very intimate amount of personal explanation. And in these days, when the population of the world is becoming so fluid, is moving with such rapidity into new territories, any new nation may find it necessary to deal with some laws in an exclusive spirit. I am not suggesting that that is right. The United States has set an example which has earned it the gratitude of mankind in the splendid—I was going to say imperial, but I dare say they would object to that word—in the superb, imperial generosity with which it has welcomed the world at its gates, and made new nations there containing composite elements from all the races of the older world. But it also is beginning to find that it must put some limits upon its generosity. And you may have at any time, even in a little State like Newfoundland, the desire or necessity to say: "We must be careful here. We are making a new race, a new nation, and we must be careful of the elements that we admit into the making of this people of the future." Therefore the right of exclusion is no ungenerous right. It is not a sordid, selfish right. It is one which every nation

in the making ought jealously to guard. Let it protect its industries if it likes. It will, perhaps, make a mess of the business when it is trying to do it; but still more imperative is the duty upon it of protecting its race.

I can imagine it being said: "Anyhow, these men only come in boats. They cannot go on to the shore." Well, that is true. But we do not necessarily want them, in boats. Anyhow, we do not want them put into a position where the competition may be such as we cannot stand on merely economic grounds. The Newfoundland fisherman says: "We can compete against the United States inhabitant easily, because the United States inhabitant is a prosperous person, with many protected interests to which he can revert in search of a livelihood. But when the United States inhabitant says, 'I am going to run this business on capitalist grounds; I am not coming to fish, and I cannot afford to get other inhabitants to come in and fish, but I can afford to build a ship, and man a ship with foreigners, and I will send it and it shall come and sweep your waters, and undersell your seamen, and deprive you of your livelihood,'"—that is the position. And it is no fanciful position. I am not seeking to test the justice of a construction by extreme cases. I am putting a thing that might arise at any day, even against the will of the United States; because the United States must leave its citizens to exercise their treaty rights as they see fit. If once a declaration is made in favour of the construction for which Mr. Root contends, why then, of course, the United States Government washes its hands of the matter. Any capitalist may organise this industry on any scale that he likes, with the help of a protected market. He has got his market. The capitalist has got the key of Gloucester, Massachusetts, in his pocket. He can keep the Newfoundland fishermen out of that, and he can organise in any nation, and from any race that he pleases, the crews for his vessels. He can organise a fishing industry which will destroy Newfoundland.

1068 These consequences are apparent to men of business, not merely to lawyers, but they are obvious to diplomatists and to men of affairs. These are the consequences that follow upon giving to this treaty this unjust extension, upon treating this right which was asked for on personal grounds, granted on personal grounds, as being a grant to individuals of a certain State and no other, as now found to confer on those individuals, those inhabitants of the United States who choose to fish, a right contradictory and subversive of a sovereign right of the Newfoundland State.

I have heard men say it is a small matter. I venture humbly to say it is nothing of the kind. Nothing is a small matter which touches the independence of a State. Let a State make its mistakes if it likes; let it indulge in fights with its neighbour; let Sir Robert



Bond stand there like a Napoleon of the northern seas, defying the United States; all these are matters that come and go—small historic incidents which, I am sure, have never spoiled the sleep of a single United States statesman. They have slept very well in spite of Sir Robert Bond. But do not let these things be made occasions for dividing the control of a State, for taking the management of its principal and only industry out of the hands of those who are locally concerned and vitally dependent upon it, and putting the substantial control of it in the hands of those who may or may not remain peacefully disposed to that State.

That is why I say questions of sovereignty are of such supreme importance; and that is why I have ventured at such length, and with such insistence, to dwell on Question 1, and why also I venture to put Question 2 upon the same footing. It is one of those things about which—respectfully I say it—it seems to me there can never be any compromise. You cannot compromise your sovereign rights. You ought not to do it. You may try to do it, but all the documents and papers in the world will not permanently pacify a nation if you in any way impinge upon their right to control their destiny and regulate their industry in the way they think best.

SIR CHARLES FITZPATRICK: Mr. Attorney-General, may I mention a difficulty that occurred to me during the course of the observations made by the President: Is it your submission that Newfoundland could, by regulation, prohibit the employment of foreigners, say Asiatics or others, by the United States, in the prosecution of the fishery, and at the same time employ them itself in the prosecution of the same fishery?

SIR W. ROBSON: Well, that question wants a little consideration. May I consider it now? I am asked whether I am contending—

SIR CHARLES FITZPATRICK: Perhaps it might help the understanding of the question if I say that I put it to you from the standpoint of discrimination. Would that constitute discrimination in the prosecution of the right conferred upon the inhabitants of the United States with respect to the common fishery?

SIR W. ROBSON: That is to say, would it be open to the Newfoundland State to permit to other classes the employment of foreigners by statute, but to forbid it to the Americans?

SIR CHARLES FITZPATRICK: Could they permit it to their own citizens?

SIR W. ROBSON: I would like to distinguish a little there. I can imagine a case in which it would be a discrimination. I can also imagine cases in which it would not be a discrimination. Supposing, for instance, that Newfoundland said: "We will let you, our fishermen, employ Orientals or Asiatics, but we will not let Americans employ them." Then, I think, that would be a discrimination.

There could be no sound reason urged why Newfoundland should have a right in fishing of that character which the United States should not enjoy. That would be discrimination.

But, on the other hand, I can imagine Newfoundland saying: "We want foreigners in the interior of our country. We have forests to hew down. We have mines to open up. We have pastures to till, and we have not the men to do it with. So we will allow, for those reasons, races of a special and separate character, foreigners, to be employed. But we will not allow anybody in the fishing industry to employ them, either Americans or English." In that case there is no discrimination.

So that, taking Sir Charles' question as applicable to the fishing industry—to which, perhaps, it was solely applied—I say that it would be a discrimination; and yet one can imagine cases where you must not discriminate against the Americans, but you can discriminate as between one industry and another.

1069 JUDGE GRAY: Are you not losing sight, there, of your contention as to the meaning of the treaty, that none but inhabitants of the United States may fish in these waters?

SIR W. ROBSON: There is no doubt that, under the treaty——

JUDGE GRAY: I am saying that that seems to be against yourself, in the discrimination——

SIR W. ROBSON: But I am dealing now with something outside the treaty. If Sir Charles' question related solely to the treaty, then, of course, I answered it a little too widely, too generally. There is no doubt at all that it would be under the treaty. If I say to my own fishermen: "You may employ foreigners," and then turn around to the Americans and say, under the treaty, "you shall not employ foreigners," then I think I should be discriminating. Of course my citizens may, if they like, now employ as many non-inhabitants as they please—that is apart from the treaty. My own citizens, Newfoundlanders, are entitled to bring in as many foreigners as they like, until there is a law forbidding it.

DR. DRAGO: The right of the United States is regulated by the treaty.

SIR W. ROBSON: Yes; their relations with Newfoundland are regulated by the treaty; but other relations of course the treaty does not affect. Of course I should hope Newfoundland would never desire to close itself off from foreign commerce. It must encourage it, if it is wise; and foreign commerce means foreigners—a plain circumstance often very unwelcome to many local traders. If you want foreign commerce, you must have foreigners, and therefore let them in. Newfoundland has that right, and will always retain that right; but of course, as General Halleck and Mr. Burge say, it is entirely in its own discretion how far it shall allow any of them any rights.



In the case of the United States, it must give this fishing right to its inhabitants. In the case of other foreigners, it may refuse them any rights, or give them some. It may say: "You may be employed on our pastures, and in our mines, and in our forests, but you shall not be employed in our fisheries." It may say that, and there are many reasons which might make that sound legislation; because the fisheries are fully manned; they do not want competition. What they are thinking about is keeping up the rate of wages. But the industries of the interior are undermanned. There they might want to let foreigners in. They must be left with uncontrolled discretion. It is impossible for this Tribunal to say how Newfoundland is to legislate in regard to foreigners, or in regard to its own citizens. It would be beyond the province of this Tribunal, and might produce, if any attempt were made to do it, by qualifications or provisos, the greatest difficulties. Its sovereign rights must be left unrestricted; and, above all, if there is to be any restriction upon them, it is not to come from the inhabitants of the United States; it is to come from whatever restrictions the people of Newfoundland themselves think proper in the circumstances with which they are familiar.

Now, Sirs, I pass to Questions 3 and 4; and, as I have already said, I am sorry to have been so long over Questions 1 and 2, and I shall try to be shorter in considering Questions 3 and 4. I think I may be shorter, because I can avoid, if the Tribunal think proper, the examination of statutes and documents, by stating generally what I use them for, and handing in a schedule or list of those to which I refer, with the references to the Appendix, giving, of course, a copy to the other side, and some short statement of what the effect is of each clause that I mention; because, after all, I am not construing these statutes; I am only dealing with them in the most general way, and there is no occasion to go through them with any minuteness.

Questions 3 and 4 relate to customs regulations, and to light dues. One may take the two questions together. They both refer to the same thing; but Question 3 is applicable to the treaty coasts, and Question 4 to the non-treaty coasts.

"Question 3. Can the exercise by the inhabitants of the United States of the liberties referred to in the said article be subjected, without the consent of the United States, to the requirements of entry or report at custom-houses or the payment of light or harbour or other dues. . . ."

That relates, as will be seen, to the treaty coasts; and then Question 4 is practically the same question, with relation to the non-treaty coasts.

1070 First I think it will perhaps be convenient to deal generally with both questions, for a few observations, and then, after that, to point out the regulations and statutes affecting them apart.

I say that when this right is given to the inhabitants of the United States, the right to fish, it is given as a right to be exercised within our jurisdiction. I have dealt with the argument that it is under our jurisdiction. Nobody, of course, can deny that, geographically, it is within our jurisdiction. Well, now, what does that involve—that they have the right to come by ships from abroad, into our waters, and there they possess the privilege of doing that which is not permitted to trading vessels. If a trading vessel were to come within the 3-mile limit, and were to remain outside the coast, outside the port some distance from a custom-house, not moving, not apparently seeking any destination, but just wandering about, from one quarter to another, the custom-house officer would say: “We must have a report. What have you got on board?” And a fishing-vessel gets the right to do that thing.

The first condition of the exercise of any such right on the part of either a trading vessel or a fishing-vessel, under a trading treaty or a fishing treaty—I do not think it matters which—is that the right must be exercised consistently with the known, contemplated, and well-understood laws of fiscal defence. I am using that phrase because I think it is a convenient way of putting what I mean. It was certainly not intended when this treaty was made that there should be any kind of attack or injury upon the necessary customs laws of the British dominions. The customs laws, then, as now, are absolutely essential to the growth of a State. You cannot govern without revenue. You cannot collect revenue without in some degree resorting to customs duties; and you cannot get your customs duties without the observance of some perfectly well-known regulations. Nothing novel; there is no question here of our demanding regulations of a character that other nations do not demand. It may be said that in particular instances they are vexations, because the fishing-vessel does not want to come near a port, and yet may be compelled to go there. Well, that is an inconvenience attaching to the exercise of the right, and nobody would say that they are superfluously imposed, or that they are deliberately or vexatiously devised. They are the ordinary duties and obligations that every vessel, under any treaty, must observe in exercising any right.

You do not, when you are making a commercial treaty, so far as I know, say that the vessel must subject itself to certain obligations of customs entry or report. All that is taken for granted. It is taken for granted, perhaps, because the vessel cannot help it; it cannot get into the port to do its business unless it does report. But supposing that under a treaty which gives a vessel the right to enter and unload its goods, it chooses to say: “We will not go into port at all, to unload. There is nothing put in the treaty to say that we must go into the harbour, and we will unload in a creek.” In such



a case as that, I think everybody would admit that the State whose waters were being visited in that way would at once seize the vessel and condemn it, as acting in contravention of customs laws, which everybody knows, and to which everyone who enters into a trading treaty must be taken to submit.

That is the law with regard to trading; and I fail, entirely, to see why there should be any other law with regard to fishing. Of course there are differences in situation. The fishing-vessel is obliged to hover, to use the expression in the statute—that is, to hang about, to remain moving slowly, not moving by way of transferring itself from one place to another, over any distance, but just simply moving about, using its nets; and it also is almost obliged, in many cases, to go into these little bays and creeks, if it has the right to fish within 3 miles; and going into these little bays and creeks, if it has the right to fish there—I am putting this merely by way of illustration, and not stating the present case—it would be very dangerous indeed to allow it to exercise all these rights in places where it is so easy to slip ashore and leave goods or take goods back. There are many, many ways in which a fishing-vessel is peculiarly well adapted for smuggling. It excites no suspicion by its hovering. A trading vessel, of course, at once excites suspicion under similar circumstances. If a trading vessel were seen hovering about outside some creek or inlet, any passing ship might, at the very next port, report it, and say: “We have seen a suspicious looking vessel hovering about in such a bay or in such and such a road”; and of course the custom-house officers would come down for it. But a fishing-vessel disarms suspicion. Its nets are being thrown overboard, nobody has any reason to suppose it is smuggling, and nobody would, therefore, voluntarily report it; and yet it is in a position in which it may easily land any cargo that it pleases, without any attention to the revenue laws. So that the necessity for regulation which exists  
1071 in the case of every trading vessel exists in a stronger degree in the case of every fishing-vessel; and yet, in the ordinary case of commercial treaties, you have to impose these regulations, and commercial vessels submit to them without any complaint or inquiry, though there are no stipulations to that effect in their treaties. So the same applies to fishing-vessels. But, of course, when we come to fishing-vessels, we have again to remember the implied obligation of reasonableness. It may be that there are regulations that we can quite easily put upon mercantile vessels—because, after all, they are supposed to go from port to port—that might be more difficult of application on fishing-vessels, which do not go from port to port, but which go out into the seas and return to their port. And these facts have to be considered in making regulations, so as to see that although fishing-vessels are under more than ordinary obligation to obey the

customs laws, yet that those customs laws should be enforced with reference to these vessels so as to cause them the least inconvenience that can be arranged. That is the general principle with regard to customs regulations.

Now, consider the regulations with regard to light dues. Here, again, you have what is really a case of payment for services. They have been paying, under the *modus vivendi*, light dues; but they (the United States) put them in issue here, saying that we have no right to demand the payment. They have not shown any ungenerous spirit in refusing the payment. The payment has been made, but they put before this Tribunal the question entirely as a question of law, and they say that we have no jurisdiction to impose such a burden, and therefore they decline to pay it. But the fact that the burden is a just and meritorious one would, I think, scarcely be denied. Of course it is contended that in Newfoundland we have shown a special degree of favor to our own seamen, because we have not put the burden on them. The reason for that is easily suggested. The Newfoundland fishermen pay towards the maintenance of the lighthouses as taxpayers, and they are the persons who really have to build the lighthouses, and it seems a little hard on them that they should have to pay for the maintenance, or pay the same as foreigners for the maintenance of the lighthouses that they have themselves built out of their taxes; and there is nothing unjust or inequitable in saying: "We must put a reasonable tax on the foreigner, whether he be commercial, or whether he be a fishing-vessel, and in consideration of your having built the lighthouses, we will put a smaller tax on you, or no tax at all.

The question is whether that is under all the circumstances an unjust discrimination. Well, now, first of all, there is very little trouble about it. We look to international law to see what it says about these obligations, in the absence of express contract. And I think, on light dues, I shall first just read a passage from Grotius, stating the law in a way in which I do not think anyone would question it.

Grotius says:—

"Neither is it contrary to the law of nature or that of nations that those who shall take upon them the burden and charge of securing and assisting navigation, either by erecting or maintaining lighthouses or by fixing sea-marks to give notice of rocks and sands, should impose a reasonable tax upon those who sail that way."

Of course that is in the absence of any obligation whatever. In that case put there, there is no treaty at all; but a person exercising that which is equivalent to a treaty right, namely, the right of innocent passage, which is not secured by document, but which is secured by international law. So that the case, in reality, when one examines it, is exactly parallel to the case of a right being exercised under a



treaty; because the seaman who takes his way, under his right of innocent passage through territorial waters, is there as of right. But, although he is there as of right, nevertheless the local authority is entitled to charge him for the service rendered in providing lighthouses, although, of course, he did not ask for them, and made no bargain about them. But it is treated as part of the understood international law, so far as it is applicable to seamen.

Grotius goes on to give instances from the Byzantines and what Demosthenes says about it, which I am afraid Mr. Turner would describe as rather obsolete law.

Then there is Vattel, who says also, with regard to those who claim the passage through straits, that the owner of the land adjacent to the strait has a right—

“to levy small duties on the vessels that pass, on account of the inconvenience they give him, by obliging him to be on his guard.”

I suppose he has got to watch them, to see that they do no harm, and he makes them pay for their own policing, and takes from them some small duty, adequate to that purpose.

1072 Thus the King of Denmark requires a custom at the Straits of the Sound.

I was unable to find, a moment ago, the passage referring to lighthouses:—

“He has a right to levy small duties . . . on account of . . . the expense he is at in maintaining lighthouses, sea-marks, and other things necessary to the safety of mariners.”

That is purely for the benefit of the mariners. It is for the encouragement of navigation. It would be impossible, of course, to make a bargain with all the mariners of the world. Such a thing would be impracticable, and therefore it is recognised as a rule of international law that if such a service is rendered it is just and equitable that those who benefit by it should pay something for it. And of course they pay for it, no matter what treaty rights they have got, or what international rights they have got. The right given by commercial treaty to enter a particular port is not accompanied, so far as I remember, by stipulations that they shall pay light duties or anything of the kind. The light duty is imposed upon them when they have got in. They have the right to come in, under their treaty, but when they have got in, this is recognised as one of the obligations that it is proper they should perform.

[Thereupon, at 4 o'clock p. m., the Tribunal adjourned until tomorrow, Friday, the 29th July, 1910, at 10 o'clock a. m.]

THIRTY-SECOND DAY: FRIDAY, JULY 29, 1910.

The Tribunal met at 10 o'clock a. m.

THE PRESIDENT: Will you please to continue, Mr. Attorney-General?

THE ATTORNEY-GENERAL, SIR WILLIAM ROBSON (resuming): At the adjournment, Sirs, I was dealing with the authorities on international law who have laid down the principle that a State may charge reasonable sums in respect of the accommodation that it affords, without, of course, having had any specific request in that behalf, to vessels which are using their right of innocent passage, or are availing themselves of the accommodation in a particular country.

I had read Grotius and Vattel, and I propose only to read one more, because really there is no dispute on the principle, and I only read the passages rather by way of indicating the ground upon which international lawyers have placed this right. Azuni, who is very well known to the Tribunal, writing, I think, in 1806, says:—

“Maritime nations have also a right to impose such contributions and imposts on the territorial sea as they may judge necessary to defray all the charges and expenses which the public security and the convenience of navigation require. For this reason when, for the purpose of rendering navigation secure and to aid mariners, lighthouses, buoys placed to point out sandbanks, and companies of coast pilots are supported, a reasonable toll may be levied on all vessels, without any infraction of natural law or the law of nations, like that formerly exacted by the Romans in the Red Sea to reimburse the expenses of the naval force which they maintained against the pirates.”

Of course there is no doubt about the general right to exact such moderate and reasonable sums by way of payment for services. But I draw attention to the principle upon which it is founded. They may do it not merely in respect of lighthouses, but also for the purpose of rendering navigation secure. These are matters which are of vital concern not only to those who are on the waters in ships, but also to those on land.

Exactly the same principle applies to what I have called fiscal defence. It is the same thing as military defence, though, of course, operating in a different sphere. Just as, according to the universal accord of international lawyers, you may take whatever steps are necessary for your physical security, for military defence, so you may take steps for that which is equally important. For instance, when we were discussing the limitations that could be placed upon the exercise of rights in a foreign territory, and we mentioned the right of innocent passage—one of the most important of those rights—it was pointed out that the state through whose territory the ship is passing would be, by international law and the law of nations, entitled to cause the ship to deviate at any particular place where



there were fortifications that they required to keep unobserved.

1073 It would be quite within the territorial power to say: "You must take a longer route because we do not desire you to make observations of this or that part of the coast." All these are instances in which rights granted either by international law and founded upon a universal comity, or upon what, after all, is no stronger when once the law is well established, a treaty or convention, are nevertheless to be taken to be impliedly subject to those reasonable burdens. Of course, in dealing with international law in relation to treaties—a subject with which I have already dealt at such length—I admitted that international law, when well established and clearly proved, like municipal law, may be taken as the basis of a contract, and may be read into a contract on those matters as to which the contract is silent, because, no doubt, the parties were contracting with knowledge of the law. And one may say also that a vessel that starts out to navigate on the high seas, and passes through territorial waters, knows that in such waters, and still more in any ports that it may visit for purposes of distress, all nations of the world claim the right to exact some moderate sum in respect of the conveniences they render by lighthouses or buoys, or the charges they are put to by way of special guardianship. And, equally, they are subject to the obligation, it may be, of being deviated from their course in order that a nation may take proper safeguards with regard to its defences; that is, to the defence either of its territory or of its laws—its reasonable and well-known laws, such as fiscal laws are. And therefore there is here an obligation which is universal in its character, which applies in the absence of treaties, and applies also to treaties unless treaties are expressly inconsistent with the obligation. Of course, parties may exclude such obligations, as they may exclude any other. And the fundamental principle which I venture to submit to the Tribunal in regard to these customs regulations and, in the same measure, to light dues (but in light dues, of course, you have another consideration equally potent) is: Every nation must be taken to have the right to defend itself in respect of its vital interests whenever it is making a treaty or granting an indulgence or conferring a liberty upon another nation in relation to its territory. That is putting it broadly, but of course I am not considering each word of the proposition that I am laying down, but putting it broadly; that, I think, makes clear the principle for which I contend, and which applies to both Questions 3 and 4.

Take, for instance, the question of smuggling. Here we have got a case which, like many contracts, has expressly provided for one particular danger, and yet has left another danger of exactly the same sort to mere implication. For instance, this contract, at the end of article 1, after it gives the right of entry for purposes of wood

and water and distress, goes on to say that right must not be abused, and therefore the local jurisdiction expressly reserves the power to make any regulations that may prevent its being abused. Obviously, there the local jurisdiction is reserving power to do something which the other side might perhaps consider unreasonable in relation to its right. Otherwise they would scarcely have troubled to insert the proviso; but of course the local jurisdiction must always, in making a grant of this kind, take care that it does not derogate from its grant, but can only make reasonable regulations. But, apparently, the framers of the treaty thought with regard to entering these bays where the United States had no treaty rights, that perhaps it would be desirable that their regulations should take a somewhat wider range than where they had treaty rights. And so they expressly put in this stipulation. It is aimed at preventing their drying or curing or taking fish or any other purpose inconsistent with the objects of the proviso, which of course would cover smuggling—and was perhaps mainly aimed at smuggling.

There is no such express provision with regard to the treaty coasts, but no one would pretend that you may not try to smuggle on the non-treaty coasts, but you may try to smuggle on the treaty coasts.

No one would pretend that was the intention. We must not push the maxim *inclusio unius est exclusio alterius* too far, because it is quite clear that the State has done nothing and set nothing in the treaty which would prevent it from taking whatever steps are necessary to safeguard its revenue laws. Well, now, is there any danger? That is the first question which this Tribunal must consider. Because when you are dealing with implied terms, or with terms that depend, not on the express words of the contract, but upon general provisions of law, of course one looks a little more closely and a little more widely at the facts, and you ask: "Is there any danger at all of smuggling?" Well, now, can there be any doubt about that? Let us just look at each step of the reasoning in relation to this point.

It is not pretended that fishing-vessels are entitled to smuggle. It is not denied, I should think, that fishing-vessels may—I hope in rare instances—want to smuggle. Because fishermen are not in that respect any better than the rest of mankind; and smuggling is one of

those things—shall I say fiscal laws, or regulations of state?—  
 1074 which derive less protection from the public conscience than almost any other kind of law. Persons of the most scrupulous character with regard to general obligations of a State take a somewhat laxer view with regard to this particular class of restrictions upon their action. And there is no doubt that fishermen—I am not saying a word against them; far be it from me—I do not think they are worse than the upper classes generally in this respect. Well, then, could one deny for a moment that if there be no inspection, no restric-



tion, no safeguard, there will be smuggling? Of course there will be. What goods do you think you would get through the custom-house paying revenue if there were no custom-house officers? Imagine the boats arriving at a port at a foreign country with no one to inspect the luggage or the things which are being brought into the country. Of course not a single penny would be collected, except from persons of such very rare and scrupulous and tender conscience as almost to excite some kind of suspicion as to their general intellectual capacity, if they made an account without any request. I think we may take it for certain that there will be smuggling unless there are some adequate, though of course they must always be reasonable, regulations. That is all we ask for. We are not asking here to enforce the full range of revenue laws in every case against fishing-vessels, although the danger from fishing-vessels is greater. Yet, on the other hand, we are not denying that there must in some cases be even a modification and relaxation of the restrictions to meet their special case. For instance, we would never allow an ordinary commercial vessel to hover. It is very striking, as one goes through all this legislation, to see that this offence of hovering, which of course from the customs point of view is most dangerous—a vessel coming along into territorial waters and not proceeding straight to a destination where she can be examined, but remaining outside where it is impossible for anyone continually to keep her under observation—you cannot have a revenue cutter always looking at her, so there she is hovering off the coast and at liberty to try to slip goods on shore whenever she gets a favourable opportunity, in which probably she will derive some assistance from the shore. So that the offence of hovering, strictly forbidden to the commercial vessel, is one which must be allowed to the fishing-vessel. So that makes some difference in the regulation that we have to impose; but there is no difference in respect of the need for regulation—none. And under these circumstances, may we not fairly apply the principle laid down by Grotius and Vattel and Azuni and everybody else? So now this is a case in which the exigencies of defence entitle the local jurisdiction to take reasonable precautions in order to safeguard its own law. But is there any reason why there should be any difference between a treaty for a fishing right and a treaty for a trading right? That question is answered by the observations I have already submitted, that if a vessel with a trading right is compelled to submit to customs regulations not specifically set out either in the treaty or in other documents (at least between the parties), *a fortiori*, the same obligation should attach to vessels that come there to fish, subject, of course, to any modifications which may be necessary of the kind I have indicated.

I shall try to deal very shortly with my case on this point, because really what I have stated covers the whole principle of the thing. There is really nothing more to be said as a matter of principle, so far as is necessary to answer the question; but of course this has been made the subject of very careful argument by Senator Turner, and I must not treat that argument as if it were not one that called for an answer. I propose to adopt this method, which I think will shorten the time: It will be for me, in dealing with the facts of the case, to show the ordinary course of the legislation and of business, the course of affairs in relation to charges of this character before the treaty and under the treaty, in order to show that the treaty was made with reference to such charges and such regulations, and that such charges and regulations were submitted to. There is a long course of statutes of the kind that one might submit, and, as I indicated yesterday, what I propose to do, by the permission of the Tribunal, is this: I propose to go through those statutes now, as part of my argument orally, but referring to them very generally, in order that the note may be clear. I will give the date of any statute I am referring to, and I will then hand in, as an additional appendix to my remarks, a complete statement of the legislation, classified as Acts which precede the treaty, up to 1783; and then, following the ordinary classification again, a fresh class for the period from 1783 to 1818, and then the statutes subsequent to 1818.<sup>a</sup> That will enable me now to deal very generally and very shortly with them as a part of my argument, instead of going elaborately through them, and at the same time will subject me to the check of reference as to each statement that I make.

1075 I take, first, the light dues. Then I will take the question of customs and report. When I come to the question of customs I may have to go back to some very old statutes, because I observe that the customs regulations of England seem to begin effectively for our purpose in 1661, when the old feudal duties were beginning to be of less importance in the national finance, and tonnage and other customs dues were beginning to assume their larger place; but for light dues one does not need to go back so far.

Before 1783 it was habitual on the part of the American colonies to levy light dues. I am only taking one or two instances of them, because they are quite sufficient to illustrate how this principle operated, both in America and in the rest of the world. I have not taken a very wide area for the selection of statutes, or it would have been interminable. I take a few of these, because they illustrate a point that may be made against me. Many of them, and especially in America, differentiate in favour of fishermen. Frequently, in laying

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<sup>a</sup> Appendix (D), *supra*, p. 1376.



down a general rule as to the liability of vessels to light dues, they say that with regard to fishing-vessels there shall be some exceptionally favourable scale. That begins in 1715, where there was a lighthouse due imposed at Boston harbour, and there also the coast and fishing-boats pay on a lower scale. This is a good illustration of the validity and propriety of this obligation, even in cases where there is a positive statutory right to enter the territorial water. For instance, this is a Massachusetts statute, and Massachusetts, as has already been pointed out, had a charter under which the right of fishing was enjoyed by all the loving subjects of the King. All loyal subjects were entitled to fish in Massachusetts waters; but, notwithstanding that the charter gave them that right, it did not deprive the colony of Massachusetts of its local jurisdictional right to charge all the fishing-vessels of other colonies and other countries with a moderate sum for light dues. That is a very good instance. They pay on a lower scale, but that does not matter for my purpose. They pay, although they had, from the Royal charter, a right to go and fish there. Nevertheless, that is not taken to be inconsistent with their obligation to pay something; the amount does not matter. That statute was in 1715.

Then, in 1751, there was in Massachusetts a more general statute, applying to all vessels, which are to pay additional dues proportioned to their tonnage, so that fishing-vessels would pay very little, but they would still pay something. The tonnage of these vessels was of course small in relation to that of the large trading-vessels, and that is one reason why, in many cases, it may have been thought not worth while to collect small tonnage dues upon vessels that were of such very moderate tonnage. However, they were then all made liable. That was for repairing damage. It was a special rate for repairing damage to the lighthouse that had been built in 1715, or somewhere about then.

Next there was another statute in 1770-71, in the same State of Massachusetts, with regard to the lighthouse at Thatcher's Island, and there—it is not important, but one just mentions it—all vessels of 15 tons and upwards, which would, of course, exempt smaller fishing-vessels, because it was not worth while collecting the dues from them, were subjected to the tax.

In Nova Scotia there was the same kind of legislation. That is, in 1759 they had to pay dues for maintaining a lighthouse at Sambro Island, and there the fishing-vessels were entirely exempt—I have no doubt because it was thought they were not of a class to be taxed. The boats were small and the men themselves were poor, and were scarcely of a class upon which it was fair to put any very considerable taxation.

I am not going through other regulations with regard to Quebec, because I think it is unnecessary. There is nothing novel in their character that I know of.

That brings us down to 1783. So that it is quite sufficient for my purpose to show that, both by the practice of North American colonies and by the principles of international law, when the right was conferred upon the United States in 1783 of fishing and entering these bays, it was known to be a right subject to these reasonable and moderate impositions. That really establishes my case to 1783.

Then, when we come to the period from 1783 to 1818, it is exactly the same. For instance, take Nova Scotia. In 1787 it levied light dues on all merchant-vessels entering or leaving Shelburne Harbour, other than coasting- and fishing-vessels belonging to the province. There, again, is an exception which illustrates the favour they show to their own fishermen, and I think that is not unreasonable. I do not think in that kind of thing there is any discrimination that can be treated as unjust. But, of course, this is entirely for the Tribunal. I am merely submitting it. We see that the French and the United States have given bounties to their fishermen. That was a thing which caused a great deal of heartburning on the part of  
1076 Newfoundland statesmen. France and the United States give bounties. Well, instead of giving a bounty, it sometimes happens that a province says that a more convenient plan is to exempt our own fishermen from these particular duties. It is only a form of bounty. Supposing that they must not do it, that they must not exempt in that way, because it might appear to be a discrimination, then it would only mean that some other mode of giving the bounty would be devised, and could be properly adopted; because you can scarcely prevent bounties of that class. At all events, however, it is clear that in these old statutes there was some measure of discrimination, or I will say tenderness, shown in favour of the local fishermen, because they often do not exempt them altogether, but they charge them less.

Then, in 1793, in the same way, it puts the duty on all registered vessels owned by any person within the province, and not wholly employed in the fisheries thereof. So that there is an exemption for those who are wholly employed in the fishery, and those vessels that did not come from the harbours of Halifax or Shelburne were required to pay 4*d.* a ton in the port to which they belonged, and collectors were appointed and penalties fixed.

In 1795 there was an amended Act saying that the dues were to be payable on arrival, instead of payable in the port to which they belonged.



Then, in 1803, a lighthouse was being put up at Annapolis, on the same scale as the lighthouse at Halifax, and dues were levied accordingly. It was the same way in 1809 and in 1812.

All these dues were paid without any complaint or protest. There was a complaint or protest, to which I shall draw attention later, with regard to light dues in the Strait of Canso; but that was only by the fishermen, the people who paid the dues. There was no protest on the part of the United States.

Then in New Brunswick it was the same way. Dues were imposed for the support of the lighthouse at the Port of St. John, upon all vessels other than upon the coasting- and fishing-vessels belonging to the province. Of course the coasting-vessels were very much of the same type as the fishing-vessels—perhaps a little larger—but a very fit subject for special indulgence or exemption. Then, in 1810, New Brunswick imposed dues for maintaining beacons, buoys, &c., on all vessels entering Miramichi and certain other bays. That, of course, has some value when one is speaking of the later question that will come on in regard to bays, showing, as one of the acts, of which there are many, that the adjacent territory assumed certain obligations and duties in regard to the bay, for which it makes charges of a character very much like the exercise of a jurisdiction.

In the colonies now forming the United States there was the same thing, just as I pointed out before 1783. Massachusetts I choose as an instance, because it is the great maritime colony of the United States, or was so in those days. Just as it legislated in this sense before, so after 1783 we find it doing the same thing. In 1804 duties were imposed on all foreign vessels entering any port of the United States, without any exemption whatever for fishing-vessels. There they thought that they could not trust fishing-vessels to come in without having them under some kind of inspection or observation, probably because it could scarcely be for the sake of the revenue that they would trouble about the few foreign fishing-vessels coming in. There were not many. But I suppose they thought it was desirable to have them under all their ordinary regulations, perhaps in order to prevent smuggling, though their way of getting at them was by a light duty.

Then, also, we see that in 1790 anchorage fees are being charged by Nova Scotia. They are very small fees. The schedule of them is set out on pp. 171 and 173 of the British Counter-Case Appendix. There is no need to go into it, and I only mention it so that the reference may be on the notes. But small fees are charged for anchorage; that means, I suppose, to cover the cost of placing these buoys in the water, to which the smaller boats may conveniently anchor; and a small charge was made for that purpose.

Then the first complaint that we have is one to which I just a moment ago referred. It was in 1806. The fishermen of Massachusetts

complained to their own Government that they had to pay light dues when they passed through the Gut of Canso; but no diplomatic protest was made. They also complained of having to pay anchorage dues if they anchored in colonial harbours. There was, again, no protest communicated to England; but the fishermen, I suppose, being accustomed to be considered as rather a favoured class, thought that they might possibly procure some exemption. However, they did not get it.

Perhaps I had better finish this enumeration, as I am on the United States part of it. I had better finish two points in 1077 regard to lighthouses before I go to the subject of Newfoundland statutes. In 1852 Sabine says (p. 1276 of the United States Case Appendix) that the fishermen are complaining of the heavy light dues at Canso and the anchorage dues in Miramichi. And although he reports that, in that great document of his which deals with the fisheries from every point of view, yet no protest is made. There is no acceptance by the United States of the doctrine that these dues ought not to be imposed. Then, in the same year, the United States consul at Pictou (British Case Appendix, p. 198) writes to Sir Arthur Bannerman, who was Lieutenant-Governor of Prince Edward Island, emphasising the importance of beacons and buoys upon these coasts of Prince Edward Island. He says:—

“It has been satisfactorily proved, by the testimony of many of those who escaped from a watery grave in the late gales, that had there been beacon lights upon the two extreme points of the coast, extending a distance of 150 miles, scarcely any lives would have been lost, and but a small amount of property been sacrificed.”

He is there writing as consul of the United States to a British governor asking for more lighthouses, and saying how many lives have been lost for the want of them. He goes on to say:—

“And I am satisfied, from the opinion expressed by your Excellency, that the attention of your Government will be early called to the subject, and that but a brief period will elapse before the blessing of the hardy fishermen of New England, and your own industrious sons, will be gratefully returned for this most philanthropic effort to preserve life and property, and for which benefit every vessel should contribute its share of light-duty.

“It has been the means of developing the capacity of many of your harbours, and exposing the dangers attending their entrance and the necessity of immediate steps being taken to place buoys in such prominent positions that the mariner would in perfect safety flee to them in case of necessity, with a knowledge that these guides would enable him to be sure of shelter and protection.”

Of course, buoys are not only indications which guide you, but they are also a means by which you can moor the vessel to the buoy, and give it such repose as is possible in these stormy seas. But now here is a representation that the local jurisdiction ought to do



more—because, of course, nobody else can do it but the local authority. If the territorial seas were open to the world at large, in such a sense that the world at large could place buoys and lighthouses there, they might be left to do it; but of course they are not. No Government will allow a foreign Government to come and place lighthouses and get a little extra-territorial spot in its own dominions. Therefore it must be done by the local authority, and as it must be done by the local authority, and is not done for the benefit of the local authority alone, both by international comity and common sense and common fairness they are allowed to make some charge for that purpose; and that is admitted by the report of the Senate in 1887—I thing it was the minority report of the Senate Committee—which says American deep sea fishermen have no greater rights by treaty or public law in British ports than British fishermen have in American ports, so far as concerns revenue, police, and maritime tolls or taxes, pilotage, lighthouses, quarantine and all matters ceremonial.

There is a broad, sensible, and most accurate statement of the general law, not by lawyers, but, as I say, by men who are engaged in the conduct of trade. The common law is recognised. If there can be international law at all, this is a strong case of it, as covering all maritime tolls. Light dues constitute essentially a maritime toll. The minority report, as I say, referred to “maritime tolls or taxes, lighthouses, all matters ceremonial,” and so on.

Now, with regard to Newfoundland, just to finish my statement of the statutes, there is nothing fresh in principle to add. The statute of 4 Wm. IV, cap. 4, imposed dues for the maintenance of the lighthouse at St. John. That is long before Newfoundland was peopled at all. It was not settled. Those dues were imposed upon all vessels except coasters and fishing-boats.

Then subsequent Acts of 1835, 1839, and 1852 imposed dues on all vessels, but coasting- and fishing-vessels to pay on a lower scale. So that there is always a little indulgence given to the fishing-vessels of the jurisdiction which is exercising the right to impose the toll. That is, every country, apparently, in making a charge upon all vessels, including its own, for light dues, has, occasionally—not invariably, but occasionally—made some special reduction for its fishing-vessels. The United States, as we see, charged all fishing-vessels alike, but I have no doubt that other statutes which I have not before me made such exceptions as I have indicated. In fact, the very statute to which I have referred made a differentiation in favour of its own fishing-vessels, because it was only foreign vessels that were to pay the tax.

1078 THE PRESIDENT: Is this differentiation in favour of national fishing-vessels not in contradiction to the sense you attribute to

the words "in common with British subjects," understood in the sense of being on terms of equality?

SIR W. ROBSON: I think not, Sir, when one comes to look at the substance of the thing, and at what was being done at the time, and what was assumed by both the parties as being the old course of affairs, and the course of affairs that would still continue. It is quite true that as to that, as regards the individual fisherman, he is getting that particular tax imposed upon him; that is to say, it is put upon American fishermen as being part of the general class of mariners who frequent those waters. No differentiation is made in favour of the American. He comes in under the general class. A differentiation is made in favour of Newfoundlanders, as far as the payment of that tax is concerned. But is there any difference, at all, when one looks at the substance of the thing? The Newfoundlander has already contributed his proportion to the lighthouse in his tax. The lighthouses are maintained, as one knows, out of indirect taxation. It is almost impossible to impose direct taxation, with a population so scattered and so poor. You can only get it by taxation of their commodities. So the Newfoundlander has paid—he has probably paid more than the United States fishing-vessel. The United States fishing-vessel is not the only vessel paying. All vessels are paying; and the bulk of the money, so far as direct payment is concerned, probably comes from the ordinary merchant-vessels who are trading to and from St. John or the other ports, because they have the largest tonnage, and they will pay the largest amount. So the United States vessels are not paying all; they are only paying their quota. And when you come to the Newfoundland fisherman, he might very well and very fairly and reasonably say: "Are you not making me pay more than the American? I have built the lighthouse. I have paid the most part of the expense of building the lighthouse. I am paying a tax on my tea and coffee, &c., towards the maintenance of that lighthouse. Should there not be some discrimination made in my favour, so far as that particular tax is concerned, in order to put me upon an equality of treatment with the American fisherman?" That is the reasoning of the thing. It is entirely for this Tribunal to say whether that is a substantial, sound and just reasoning.

That is the reason why I am laying a little stress, as I go along in these statutes, upon this differentiation. Senator Turner, of course, rather inferred that the fact that fishing-vessels were so frequently exempted, wholly or in part, under these statutes, was in his favour. But it does not strike me so. It seems to me that, on the whole, it favours the contention I am submitting, namely, that they are all liable, that the jurisdiction to make the tax is complete, but when you come to consider, as with every other tax which falls indiscriminately upon all, there are some classes which are more entitled to



consideration, and we carefully arrange our fiscal burdens so that they shall fall on the broadest backs. Fiscally the seaman's back is not very broad; and so we try to exercise our jurisdiction properly in imposing the tax on all, and we say with regard to this particular class we will make this discrimination, because he has already contributed what may be treated as his quota. That is the whole argument on it, which I leave with the Tribunal, because it is quite simple, and one does not need to labour it.

In Newfoundland there were no lighthouses at all until 1834. And then this statute of 4 Wm. IV, cap 4, imposed dues for the maintenance of the lighthouse at St. John on all vessels except coasters.

Then there were subsequent Acts which imposed dues on all vessels including coasters; but they made a lower scale for coasting- and fishing-vessels. That is exactly acknowledging the principle for which I am contending. They are all liable to pay, they must pay something, but some of them have already paid something as taxpayers, and they will be charged less as fishermen.

Then comes the statute of 1899 [62-3 Vict., cap. 19], in which that discrimination is made absolute, because there is now nothing charged on the fishing- and coasting-vessels of the colony. Of course all that depends upon the incidence of the general fiscal burden. It is almost impossible to judge whether that is putting the matter exactly even as between the two classes. It is very difficult, because you have to take into account the whole burden of taxation falling on the population generally. So that, as to whether the fisherman is getting any advantage there I should scarcely like to say. It does not seem to me that you can treat it otherwise than as a matter of right, just as we leave each nation at liberty to give a bounty if it thinks fit. That is treated as being absolutely outside the scope of the treaty, because there is no question that America may give a bounty if it likes, and

has given bounties, and so has France; so that, really, this  
1079 question can scarcely be treated as a matter of calculation; it

can scarcely be treated by asking the question: "Is the American treated in exactly the same line as the Briton," because nobody can quite judge, until you know the whole incidence of the taxation; but it is treated as a matter of right. They have a right to give them a bounty. Although the two classes of fishermen are to be treated in common, that has never been thought inconsistent with the bounty. Treating in common means treating in common when you come here, although you may have got money in your pocket, before you started, from your Government, to induce you to start, or you may get money when you go back, because you have been there, in the form of a bounty. Still, the treaty is not interpreted with reference to those collateral incidents at all. Any class of fishermen is left to enjoy a

benefit that its own Government chooses to give, by way of bounty, and this is, as I say, put practically on the same basis.

At one time the United States gave a bounty to their own fishermen, in 1845, of 20s. a ton, as appears on p. 1068 of the United States Case Appendix.

Senator Turner has pointed out that under the *modus vivendi* of 1907 we were willing to waive the question of light dues; but I think ultimately, notwithstanding that, the United States did in fact pay them. But that was all a matter of bargain, as to a matter concluded in a great hurry. There was, in 1907, great anxiety to get the *modus vivendi* arranged before the fishing season began in October; and some well-earned holidays were disturbed in September, in order that the two Governments might get to an agreement; and it was really all a matter of negotiation and bargain, rather than of each side weighing its own rights or legal obligations and responsibilities.

I now come to customs, and I have already, I think, dealt generally with the principles that I consider applicable to this matter of entry and report.

THE PRESIDENT: As to duties, Mr. Attorney-General, you make no difference between the third question and the fourth question—as to the exaction of duties?

SIR W. ROBSON: No, Sir; I do not think the fact of the existence of the treaty makes any difference on the principle of the thing. In one case you have the right to come to the treaty coast. Now, is it a right which is, therefore, free of duty altogether? Well, the way in which I will test that is by asking what is done with regard to the duty in other cases where there is equally a right? There is equally a right, for instance, under international law, of innocent passage; and yet all international lawyers are agreed that you may, in such a case, charge a light duty, although there is the right just as strong by law as you can make it by treaty.

THE PRESIDENT: You attribute no importance to the circumstance that, under Question 4, there are cases, more or less, of distress, in which the vessel enters for the purpose of shelter, repair, wood or water? Some of these cases—shelter and repairs—are cases involving distress; and also, to some extent, perhaps, the case of the entrance of the vessel for the purpose of procuring wood and water.

SIR W. ROBSON: Well, I should say that a vessel entering because of distress is under a peculiarly strong obligation to pay light dues. One must not treat a right here which depends upon humanity as though it were therefore to be treated gratuitously. All light dues are mere questions of humanity. I believe our ancestors had a genial habit not only of refraining from putting up lights, but of putting up false lights, in order that they might enjoy their manorial rights, which included the right to take whatever wreck they found on the



coast. We have long since got beyond these mercantile pursuits, and we therefore now put up lights warning and helping vessels who pass us in the dark, and from whom we can get nothing; but whenever that vessel comes into port—distress or no distress—we make her pay light dues; and we make that charge on every vessel pursuing its career for profit. For instance, take the vessel that comes in in distress. It is not to be treated like the human being who has broken his leg and cannot walk along the street, so that we carry him to the hospital. The vessel comes in not injured, but in order to avoid injury; and we have enabled it to avoid injury; and it then pursues its way, making its profit. Well, under these circumstances, that is exactly the kind of a vessel that ought to pay most gladly. I do not think at all it is the sort of a vessel that is entitled to put up a plea and say: "Do not charge me anything. I am only making 25 per cent. on my year's trading, and I am doing it by your help, because you have put a light up and saved me from being wrecked; but  
1080 don't charge me anything, because it is such a shame to charge persons whom you are saving from wreck." That is not the maritime way of looking at the thing.

Take a parallel case, of which I have had considerable experience—cases of salvage. There you get salvage where the vessel is actually not merely in distress, but on the high seas helpless, or it may be abandoned. And then another vessel, passing, comes and takes it in tow, takes hold of the vessel, which may be half-wrecked, or injured by going on the rocks, or something of that sort—another vessel comes and tows it away. That is a very fine act, which is performed by that vessel, perhaps even at very great risk; but the English Admiralty Court allows the saviour of that vessel to come into court and claim compensation known as salvage, and very large sums are given.

I remember it was once my duty to argue a case for a lifeboat, which was stationed up in the Pentland Firth, amid very stormy and dangerous seas, and this lifeboat had, at the peril of the lives of the men on it, gone out to attend upon a large ship which was supposed to be in danger. The great ship got out of danger. It had never invited the attendance of the lifeboat, but the lifeboat, through two days and nights—a very fine display of endurance and courage—stood by, as it is called in nautical language, the big ship, kept near it, followed it, so that in case of accident it should be ready to take the crew off the ship. Well, the Court of Admiralty gave that lifeboat, for whom I appeared, 1,700*l*. They said: "This is a very fine act. Ship-owners must not suppose that they have a right to avail themselves of such a splendid service as that, and then go on their way, making enormous profits, and leaving the hardy seamen to go back to their cottages with no compensation except the satisfaction of having done a noble act for a great ship-owner." So they gave those men

1,700*l.* among them. And nobody would say that was an unjust thing.

So when a vessel is saved by a lighthouse, and comes in in distress, there is no hardship, there is no sordiness, there is no divergence from a proper spirit of humanity in saying to the owners of that vessel: "We have saved you, and you must give something in order that other people may be saved, because that is really the least you can do. When we have preserved you from wreck, the least you can do is to take care that the lighthouse is maintained for the benefit of those who may come afterwards."

So that the principle of law appears to me to be about as strong and meritorious a principle as you can have; because it is a principle of payment for services rendered. And in the same way with regard to customs dues. That is a different principle, but it is one, I think, equally strong.

Well, now, I have dealt with the broad underlying principle of this claim, and I would just like to refer to one or two instances of the necessity—one or two arguments showing the necessity of some provision against smuggling.

Perhaps I had better first here refer (and I will do it very generally) to the old statutes, of which there is a long series. I am certainly not going through them all. There is a long series of statutes relating to the prevention of smuggling in our legislation. The same sort of statute will be found in the legislation, I think, of every country in the world. They are all on the list I shall hand in. They begin with us as early as 1661. There are statutes anterior to that date, but that is the only one worth mentioning, because I think some of the sections are practically still operative, or at all events they have been repeated in subsequent statutes. That required all masters of all vessels arriving in England to enter at the customs. Of course, it did not apply that obligation to vessels already within our territorial waters and under continual observation. There was no danger there of smuggling. You could only smuggle from one part of the kingdom to another, which was not defeating any revenue law, but all foreign vessels had to suffer that inconvenience.

There is no discrimination. I could not help thinking that Senator Turner thought of American vessels having to do all this, and the local vessels not having to do it, as discrimination. It is no discrimination at all. The obligation is not put on the local vessel, because it would be absurd in the case of the local vessel—the local vessel which has a habitat at a particular port, and is at liberty, if it likes, to go to-morrow. It does no harm to Newfoundland by going and staying in the United States, or equally it may go from one port in Newfoundland to another port, and there is no harm to the customs law. It may carry brandy from one port to another, and it is not



defeating the revenue. But when a vessel comes in from outside the jurisdiction this law then applies. It is not a case of discriminating between two classes of vessels. It is a case of one class of vessel, by the very nature of its habitation and its circumstances, alone coming within the danger that is aimed at by this legislation; and therefore it alone can be made the subject of these safeguards and penalties.

1081 All foreign vessels therefore are subjected to this burden.

Now, that related only to England, and it was not until William of Orange, William the Third, that the same principle was applied to all plantations, that is, all the colonies. They were then just beginning to be of fiscal importance, and the King was collecting his revenue there, though, of course, he was only collecting it for local purposes, never for transmission to England, but the same provision was applied to all the plantations, all the colonies, so that every foreign vessel had to be subjected to that.

Then, in 1763, comes the first hovering statute. That is 4 Geo. III, cap. 15, and it gave power to visit and expel any foreign vessel hovering within 2 leagues of the coast of the colony. That is the first of the statutes, and, of course, it is soon discovered it needs a little strengthening, so in 1767, 7 Geo. III, cap. 46, provides for entry and clearance of all vessels arriving at any British colony in America or departing therefrom, and for declaring on oath by the master as to the business, destination, and cargo of his vessel.

So that under that act every vessel arriving at a British colony, whether trading or fishing, whether it came from Massachusetts, or Nova Scotia, or Newfoundland, in inter-colonial trading—they all had to make the report and declaration.

Now, there was a case where we were not taxing our vessels, at least not necessarily taxing our vessels. There were vessels coming from one part of the Empire to another, and it was not for the purpose of collecting revenue from them, but for the purpose of making sure, that they were not contravening the customs laws. I have not a full recollection of all the sections of the statute in my mind, but its main purpose obviously is a safeguard. You cannot tell where the vessel has come from. It may have come from some place where it could get hold of dutiable commodities, that is commodities subject to taxation on coming to England or the colonies, and it may be discharged without anyone knowing. So that there is an obligation put by way of protection and safeguard upon every vessel including our own. We put this obligation upon our own vessels when they come from outside the territorial waters concerned. In the old days vessels coming from England had special privileges in Newfoundland, because Newfoundland was regarded as a sort of peculiar kind of private property of the British Crown. Senator Turner read

some passage showing that, as though it was some great enormity. It was not so considered then. I do not think it was a particular enormity. It was valuable for fishing at that time, and although it was intended for the particular benefit of the British Crown, and any class the Crown might favour, yet they all had to make their entry. British ships were specially favoured in the matter of obligations or taxes, specially favoured, but they all had to make their entry. That was essential for fiscal purposes. They always had to do it.

Then to this day I believe, although it is in the form of consolidated statutes, section 9 of that very statute of 1767 is still in operation in something very much like the same terms, as it always was.

Then the statute of 1775, for instance, which has been so often referred to in other connections, made just after the outbreak of the Civil War, was no doubt intended to exclude the United States, the then revolting colonists, from the benefit of Newfoundland, and so taxes were laid on all vessels with a special exemption in favour of British vessels, but still the British vessel had to make this report on its arrival. The master still had to report or clear going outwards, and she had to pay for each report a small fee, not exceeding half-a-crown, showing that it must have been treated as essential and necessary, or we would not put it upon our own men, whom we were specially desirous of encouraging.

So that if you take the date when the United States declares its Independence, 1776 (and the same state of things is prevailing in 1783), you have there all fishing-vessels, foreign or colonial, whether trading or simply fishing, all subject to every revenue regulation—every one.

That is the condition of things in which, and with regard to which the parties are contracting in 1783.

Then there was of course in respect of fishing-vessels coming from Great Britain and carrying no merchandise, some relaxation of taxation, but no remission or relaxation of the obligation to report and enter.

Well now follows a list of colonial statutes, which I can deal with very broadly.

They relate to all the colonies, Nova Scotia, Prince Edward Island, and New Brunswick, and they all of them have the effect of applying to every colony, and to every class of vessel the obligation of reporting.

For instance, Nova Scotia in 1769: "All masters of ships fishing and all other vessels . . . . shall . . . . within twenty-four 1082 hours after . . . . arrival make report." That applies to every colonial ship. And, its declaration on oath has to be made as to alcoholic liquors.

Then in 1775 Prince Edward Island to the same effect.



1807, New Brunswick, to the same effect. "Every master of any ship or vessel . . . shall within twenty-four hours after his arrival . . . make report . . . under oath."

Then the United States, 1789 and 1790: "Masters of every foreign vessel to report and deliver manifests within forty-eight hours of arrival." The manifest is a list or statement of the cargo and of all the goods that are on board. A very useful thing upon which to insist, because that gives an opportunity of punishing the master if he has got alcoholic liquors or things of that kind on board on which he ought to pay duty, and does not state them.

Then it also provides that revenue officers are to have power to go on board and search.

They do sometimes discriminate between fishing-vessels and other vessels, and between British fishing-vessels and colonial fishing-vessels, but I believe I am right in saying that in every case you have the obligation to report generally and clear. If you can report you can equally well clear. That is done in every case in order to protect the revenue.

So that it would be a very remarkable thing if in 1783, when the Americans were accepting this right, this concession with regard to fishing, they supposed that the whole body of legislation relating to customs duties was to be suspended or abrogated in their favour, and in 1818 still less likely they could have supposed it, because since 1783 they had peacefully and cheerfully submitted to that legislation. In fact, one only has to put the proposition plainly to see how absurd it would be to imagine that England, in order to comply with the request of Mr. John Adams that this liberty should be allowed to American fishing, was going to abrogate its revenue law.

Now, there are a few points with regard to the danger of smuggling that I think I should draw special attention to.

Mr. Elder gave one or two cases of very hard taxation. The cases he gave I am not going to deal with at length, but certainly they might very easily lead to some misunderstanding on the part of the Tribunal. He gave one case, I think I noted it as the case of Captain Cosgrove of the "Columbia." That was his strongest case, in fact it was very nearly his only case. The others were just lightly referred to. He said: Now here is a man who comes with his vessel into the Bay of Islands. The Tribunal will remember he went up to the middle arm, and he took a cargo of salted herring. Well, Mr. Elder stated that with perfect fairness of course, but it was rather calculated to make one pause for a moment. This was not the case of the poor fisherman. It was the case of the ordinary trader taking a cargo of salted herring, and apparently he was rather late in the season. He looked about for a custom-house. There are three there—in fact, there are four custom-houses and a revenue cutter at the island. He

thought perhaps he would meet the cutter as he went out. So he did not trouble about the custom-house. Then he did not meet the cutter. Then there is another custom-house still further on at Lark Harbour, and he thought perhaps he would be able to make Lark Harbour. Then the weather got bad, and he began to think it was late in the season, and he remembered that his employers, Messrs. Pew and Son, of Gloucester, Massachusetts—he remembered that they had told him that he must on no account get caught by the ice, he must come away. Well, if he had been anxious to fulfil the obligation to his employers, and his obligation to the State, he perhaps would have gone there a little earlier, and would not have stayed quite so long. But, he thought, I must get away, whatever the laws of Newfoundland say, Messrs. Pew and Son are a rather more close and important authority, they say I must go, and so he went. Then, says Mr. Elder, as if it were some enormity: he came back again, and he was arrested. I should think he would be arrested. And, he was told he had no business to go without clearing, and he was fined 40*l*.—two hundred dollars.

Now, says Mr. Elder, is not there a case of hardship? I say, and very emphatically, as one having some humble concern with the administration of the law, it was no hardship at all. It served him, right. He would well have deserved and merited a higher fine than the 200 dollars put upon him. Just consider! Here he comes into a port late. The Tribunal can judge as well as I can about the idea of his being locked in the ice at that date—I forget what the date was in November—

SIR CHARLES FITZPATRICK: He was not in the exercise of the treaty right at all, was he?

1083 SIR W. ROBSON: Oh no, not fishing at all. He was buying salted herring; but Mr. Elder put it, I almost thought, with a little catch or sob in his voice, that this was a hardy fisherman, the laborious and poverty-stricken fisherman. Not at all. It was the trader—I will not say millionaire, but a highly important and prosperous gentleman in Gloucester, Massachusetts, who paid the fine. He did not pay a penny too much—not a penny too much. He sends his man there, and he says in effect, according to Captain Cosgrove's story: Don't you trouble about Newfoundland or Great Britain, those powers are remote, I am the person you have got to think about; last season one of my ships was caught in the ice, don't let that happen again or you will—leave blank what will be the alternative, what will happen if that occurs again—you must come out. The story told by Mr. Elder, as told by Captain Cosgrove in his own affidavit, as to the orders he got from his employers, was nothing less than tantamount to a requirement on the part of his employer that he should break the law if necessary. And, just imagine a man



getting into a place like the Bay of Islands where he has three custom-houses, where he has a cutter, and then another custom-house at Lark Harbour, and has not time to enter, but must go. Well, if that were the state of things, he had no business to go.

I have continually, in the course of my experience for the last thirty years, to deal with vessels that go to all kinds of ports, where they are subject to every kind of detention, especially the ice-bound ports of Russia—continually. It is a very fine speculation, it is a fine sporting voyage to see whether you can get in late and get your cargo and get out again before the ice comes. But, I would like to know what would happen if a captain went out without clearing, or without reporting himself, and then came back the next year and said: Do not tax me. What would happen if he said that to the Russian authorities? What would happen if he said: Do not punish me because I am a tradesman and a poor mariner, I wanted to get out before the ice came. They would say: You should have taken that into account before you came. In reality it was a preposterous excuse. In November I am told there is no such danger as being detained by the ice, and that no vessel need hurry off like that in defiance of the regulations without reporting. It was a perfectly legitimate case of punishing a deliberate disobedience of the law. We were not fining Captain Cosgrove. We were not fining his wife and family, as Mr. Elder seemed to think. We were fining Messrs. Pew and Sons, the fish dealers who had, according to Captain Cosgrove's own statement said: Mind you get out, you are not to be locked in the ice, you are to get out.

That is the kind of case which is put forward as a hardship. We have nothing to do with it, absolutely nothing. It does not touch the treaty right, and if it did it would make no difference, or very little, because equally they are bound to obey regulations like that in regard to trading.

Well now, I will pass over that class of case, because it does not assist us to come to an exact or clear judgment on the merits or the law. Instances of occasions like that will more likely obscure, than anything else, when they have nothing to do with any conceivable point of law concerned in the case.

The Bay of Islands is an important place, and one cannot imagine better facilities than there are there for complying with customs regulations. The Bay of Islands is really the place where the American vessels go. That is where the herrings are caught, and if you want to fish, the Bay of Islands is the place to go to. If, instead of fishing, you want to buy herring, equally the Bay of Islands is the place to go. I believe, if an American vessel wanted to go to any other bay, certainly any other bay of importance, they

would find a custom-house. But, in the Bay of Islands there are plenty.

I have here one of the officials from the Bay of Islands, Mr. O'Reilly, and perhaps you will allow him to go round and show upon this chart where the custom-houses are within the coasts used by the American vessels.

(Mr. O'Reilly exhibits the position of custom-houses by means of a map.)

JUDGE GRAY: Have you shown one of these maps to the other side?

MR. WARREN: There is no custom-house on the north side of the Bay of Islands at all.

MR. O'REILLY: The cutter is here. She takes in the four arms. She is stationed there.

JUDGE GRAY: Where did this vessel sail from when she went out—the "Columbia"?

1084 MR. O'REILLY: From here. (Indicating.)

MR. WARREN: This is Green Island. If they go out that way there is no custom-house.

MR. O'REILLY: That would not be in their course. That is the way the vessels always go out when bound for Gloucester or bound to sea. (Indicating.)

JUDGE GRAY: Are you living there?

MR. O'REILLY: I do not live there—no.

SIR W. ROBSON: I am told Mr. O'Reilly is the Inspector of Customs, and that he goes there very frequently, especially during the season's trading. He is there all the time the American boats are there.

Of course, the Bay of Islands, in practice, is really the important place, but there are other important bays at which there are some customs arrangements. One is surprised, when one looks around the coast, remembering how small a country Newfoundland is, at the number of custom-houses. One would almost think that one of the main reasons for the existence of the island is the collection of revenue. They have plenty of opportunities for collecting it if they can get the vessels there to pay. Then we, of course, have only demanded that if a vessel enters a bay or port for distress or any other reason of that sort, and if there is a custom-house, she shall report. We have never demanded, we do not now demand, that a vessel shall report herself to non-existent custom-houses or that she shall go some great distance quite unnecessarily in order to make a report; but, if a vessel comes to fish within reasonable distance of a custom-house or any port or place where goods are easily landed, then, of course, we expect that she shall avail herself of the accommodation that is there and make some report accordingly.



The necessity for it, is, I think, shown both by Mr. Sabine's report and also by the report of Mr. Manning. At pp. 1040-1 of the United States Case Appendix, there is a petition in 1836 to the Legislative Assembly of Nova Scotia in which the danger of smuggling is mentioned and in which regulations are asked for to put a stop to it; and at p. 1186 Sabine points this out as one of the dangers against which we desire to be secured. Sabine refers to Macgregor, in his "Progress of America," and says:—

"Macgregor, in his 'Progress of America,' published in 1847, thus speaks of occurrences at Crow Harbor and Fox Island, two of the favorite resorts of mackerel in Nova Scotia.

" 'These places,' he remarks, 'while the fishing season lasts, are generally the scenes of the most lawless disorder and licentiousness, occasioned by the violence of the fishermen contending for the best places to haul the seines ashore; the pillaging of the fish; the selling and drinking of rum; the smuggling of goods by the Americans.' "

Now, of course, rum is a thing so easily smuggled, and it is a thing so dangerous in its results, not merely from the point of view of revenue, but also from the point of view of morals, that the Newfoundland Government is very naturally anxious to prevent it being disseminated among the population.

Then, Mr. Manning, United States Secretary of the Treasury, deals with this question of the reasonableness of Canadian customs regulations. At p. 372 of the British Case Appendix he draws a parallel between the Canadian and American coasts and he says:—

"The head of this department,"—

Because he himself is Secretary of the Treasury—

"having the responsibility of enforcing the collection of duties upon such a vast number of imported articles, under circumstances of so long a sea-coast and frontier line to be guarded against the devices of smugglers, should not be inclined to under-estimate the solicitude of the local officers of the Dominion of Canada to protect its own revenue from similar invasion. The laws for the collection of duties on imports in force in the United States and in the Dominion of Canada, respectively, will be found, on comparison, to be on many points similar in their objects and methods. They should naturally be similar, for both had, in the beginning, the same common origin. In the United States, Congress has divided the territory of each State by metes and bounds, usually by towns, cities or counties, into collection districts, for the purpose of collecting duties on imports, and in each collection district has established a port 1085 of entry and ports of delivery. In that manner all our sea-coast frontier is sub-divided for revenue purposes. The object of our law is to place every vessel arriving from a foreign port in the custody of a customs officer immediately upon her arrival,"

That is every vessel. It does not say that some vessels are to be free because the smuggler will at once get himself on board that one

class of vessel. If fishing-vessels were to be entirely free every smuggler would assume the peaceful and meritorious guise of a fisherman:—

“The object of our law is to place every vessel arriving from a foreign port in the custody of a customs officer immediately upon her arrival, in order that no merchandise may be unladen therefrom without the knowledge of the Government. The Canadian law is much the same as our own in that regard, and in comparison with our own does not seem to me to be unnecessarily severe in its general provisions.”

Then he gives the provisions of their own law applicable to every foreign vessel coming into their waters—

“‘Within twenty-four hours after the arrival of any vessel, from any foreign port, at any port of the United States established by law, at which an officer of the customs resides, or within any harbour, inlet, or creek thereof,’—

I am missing out the immaterial words—

“‘the master shall report to such officer, and make report to the chief officer, of the arrival of the vessel; and he shall within forty-eight hours after such arrival make a further report in writing to the collector of the district, which report shall be in the form, and shall contain all the particulars required to be inserted in and verified like the manifest. Every master who shall neglect or omit to make either of such reports or declaration, or to verify any such declaration as required, or shall not fully comply with the true intent and meaning of this section, shall, for each offence be liable to a penalty of one thousand dollars.’”

Anyone having any knowledge of revenue statutes knows that you are obliged to make the penalties severe. They must always be substantial because the profits of successful evasion for so long a period are so great. It is not merely like punishing a man for committing a wrong, but you have to have heavy penalties for men who commit offences against the revenue, because you know that they have had that much money in their pockets for perhaps years and you are only getting back a little bit of your own:—

“Condemnation does not, in the opinion of this department, justly rest upon the Dominion of Canada because she has upon her statute-books and enforces a law similar to the foregoing, but because she refuses to permit American deep sea fishing vessels, navigating and using the ocean, to enter her ports for the ordinary purposes of trade and commerce,”

That is a totally different matter and there the complaint that is made by the United States against Canada might, without any less force, be made by Canada and Newfoundland against the United States.

The difficulty of entry seems to me slight. I cannot really think that this Tribunal should be troubled with it when one sees how



very little there is between the parties. We do not want a report made where a report is practically impossible. What we do want is that when vessels come into places where there are custom-houses in the neighbourhood or district and where they, with a little reasonable deviation, can make their report, they shall so report. For instance, in the Bay of Islands, it is a very trifling matter to deviate to the custom-house there from the fishing ground; it is all in the same neighbourhood; and, in the same way, supposing they were fishing outside of the Bay of Islands, it would not be an unreasonable demand to ask that before beginning operations they shall report themselves, because, afterwards, if they remain outside the Bay of Islands, hovering, of course, fishing, but being in the position of hovering vessels, you cannot keep them under observation and you cannot tell whether they may have been running supplies ashore because they would be visited by people who would try to sell them goods. So, we think that not only in the bay, but outside the bay, anywhere within reasonable distance of a custom-house, it is right that they should be compelled to report.

Now, what is reporting? Mr. Elder, as far as I understood his remarks, and perhaps I misunderstood him although I listened to him and have since seen the note, said that he did not object to the mere report but that what he objected to was entry, because entry, if I have correctly understood him, involved a clearance. I really do not see his distinction. What is report, what is entry, and what is 1086 clearance? Entry and report are substantially the same thing.

I have no doubt that Sir Charles Fitzpatrick, who, in all probability, has some admiralty jurisdiction, and Mr. Justice Gray, will be able to keep the Tribunal straight on this if my own description is inaccurate, for I have not familiarised myself with the local conditions in Newfoundland, but a report is exactly what its name imports. The master must go to the custom-house, and there is a little printed form, the simplest form possible, giving the name of the vessel; he must fill in his own name, where he comes from and some slight description of the vessel. It is very slight because every vessel is registered and the registry is known. He puts in the name of the vessel, where it is from, perhaps its tonnage and then he says whether or not he has anything on board. Some one sent me a copy of this entry document and I had hoped to have had it here, but I have not got it unfortunately; it can easily be produced. But, after all, its contents are easily stated. Of course, if it is a trading-vessel, he shows his manifest which is a document which contains a complete account of his cargo, stores, and supplies. He says: There is my manifest, there is a statement of what I have on board and I declare that I have nothing else on board—of course, nothing else of importance,

and if, when the custom-house officer goes on board and searches the ship, he finds there something else on board, a keg of rum or a hogshead of whiskey, he confiscates the liquor and he has the man punished for making a false declaration. The declaration is required of him in order to put him under penalties if he is not telling the truth.

That is the report—nothing else. In the case of a vessel coming in to fish there is nothing to be declared except the declaration of the stores. The form would simply be: "I, John Smith, of such and such a vessel, declare that I have nothing on board except stores and supplies necessary for the purpose of fishing; or, I have no alcohol, or dutiable liquors on board." That is all. That is his report, that is his entry, and I do not understand what the objection is. There may be some technicality with which I am not quite familiar, but I do not understand the difference which was suggested between report and entry. You enter your ship by reporting your ship and then, having entered, of course, when you go out, it is convenient that you should clear. Mr. Elder seemed to object not to the report but to the entry, because entry involved a clearance.

There is nothing in clearance. It is not a thing of any importance whatever to Newfoundland. Clearance is not useful to the port you are leaving, it is useful to the port to which you are intending to go. It is an indication to that port that you left the last port with nothing on board except that cargo. You declare when you go out what you have got on board and if you have taken on board a cargo, liquor or anything of the kind, you must say so. It is a check upon your conduct in the port to which you go, but still, in so far as Newfoundland is concerned, it does not need to trouble about the clearance of the fishing-vessel. But, it must have a report because it wants to inspect the vessel. That is done perhaps in a moment. You simply send your man on board; he goes round to half a dozen vessels in a very short time and he will see if any of these vessels have any brandy or tobacco on board. These are the two things that they are anxious about. I do not suppose that there will be a great demand for silks and laces among the population of Newfoundland. Brandy and tobacco are more likely the kind of thing that that population finds necessary or convenient; but the customs-house officer goes round and sees whether there is any brandy or tobacco on board and says, if not, I will let you alone; you may do what you like and go where you like—it does not matter to me. There are no export duties in Newfoundland. Of course, if there were export duties clearance would be necessary and advisable, but in so far as I know there are no export duties. There might be duties on pulpwood and so forth, but that is a very bulky cargo and it would be very easily discovered.



All we want is simply that a master of a fishing-vessel coming within reasonable distance of a custom-house should say to the custom-house officer: "I am here; now, you can look at my vessel"—and the custom-house officer, having looked at his vessel, has absolutely no further concern with him and does not care a penny about him. If any clearance is given it is given for the sake of the vessel itself and for the sake of the port to which it afterwards goes.

THE PRESIDENT: Clearance is not mentioned at all in Questions 3 and 4 specifically.

SIR W. ROBSON: No, there is just "any other similar requirement." I suppose this question is put in that form, in dealing with the general question of right, because, supposing that Newfoundland 1087 developed some industry of a valuable character where the commodity was easily carried and easily concealed, and they chose to put an export duty on it, it would be desired to have a clearance. Export duties are really only economically of value when they do not interfere with the sale of the commodity in foreign countries. For instance, if nobody else had any coal in the world, England could safely put an export duty on coal because the consumer should have to pay it. If he wanted coal he would have to pay an amount equal to the duty. But if there were a great many other competitors selling coal it would not be so convenient to have this export duty. If Newfoundland discovered some kind of mineral or established some sort of industry the product of which the rest of the world must have and which could only be got from Newfoundland, then it would pay Newfoundland to put on an export duty. At the present time it does not, and that is put in the question in case Newfoundland should have a lucky find. It may be that some day an export duty may become advisable, and under such circumstances a clearance would be necessary. That is a matter as to which an appeal could then be made to this Tribunal.

That really covers the case as I have ventured to put it, but there are just one or two points that I want to deal with which were dealt with by Senator Turner.

First of all, he said that in 1818 there was no population, and that the parties could not have contemplated the necessity for custom-house regulations. It is quite true that in 1818 there was no population. There was one custom-house at St. John's because the statutes show that vessels were compelled to report at that custom-house when they came from Great Britain, showing that although there was no resident population, the Imperial authorities thought it dangerous that there should be the smuggling of liquor, and so forth, and the results described by Mr. Sabine. But, it does not matter whether there was a population then or not. The question is not: What was it then? but: What was the condition of things

in reference to which the two parties were contracting? They were both contracting upon the basis, and the basis then known, of international law, and nobody can deny that if there had been a population custom-house regulations would have been necessary and applicable. Equally, nobody can deny that the parties must have regarded as possible that a population might come, because they speak of the unsettled bays, and they make provision for the case of bays afterwards becoming settled. So that a population was contemplated, and wherever it is contemplated that human beings may come and dwell there, it is also contemplated, the tax-gatherer will come and dwell amongst them, and regulations would become necessary as human beings came into existence.

The next point he made had reference to the smuggling provision suggested in the British project of the 6th October, 1818. The Imperial authorities desired to add a term to that treaty to make more express and more stringent the safeguards against smuggling, and the American negotiators objected. Mr. Turner says now that they objected and that, therefore, you must not read into the treaty provisions which, in effect, are the same as those which the United States declined to accept. What was the provision that the United States declined to accept? It was this, p. 89 of the British Case Appendix:—

“And in order the more effectually to guard against smuggling, it shall not be lawful for the vessels of the United States, engaged in the said fishery, to have on board any goods, wares, or merchandise whatever, except such as may be necessary for the prosecution of the fishery, or the support of the fishermen whilst engaged therein, or in the prosecution of their voyages to and from the said fishing grounds. And any vessel of the United States which shall contravene this regulation may be seized, condemned, and confiscated, together with her cargo.”

I do not wonder that the United States Commissioners objected to that. It is all very well to provide against smuggling, but that is just one of the provisions against smuggling which are very easily made the occasion of oppression against you. For instance, it was very hard to leave to the local legislature the construction of a provision which said that they were not to have on board any goods, wares or merchandise except such as the local magistrate might think necessary for the fishery, and if they had then the whole vessel was condemned. Well, I do not wonder that the United States Commissioners said: We are going to object to that; we do not think it is necessary; leave that to the law. That, in effect, is what they say—leave it to the general law; the general law is applicable, why make a provision of such stringency? and that is what was done. What was it that Senator Turner desired to have inferred from the fact that that provision was rejected? Did he desire to have it inferred



that there would be no provision and no law against smuggling at all? Surely he cannot expect us to accept that inference. All that was meant when a provision of that very unusual character was rejected was that the safeguards against smuggling must be such as are provided by the ordinary law, and need not be anything stronger.

I think that I have now covered, I hope not at too great or too tedious a length, the whole of the ground with regard to the distinction between the treaty and non-treaty coasts; and I have already pointed out that it is not a distinction which relieves those who frequent the non-treaty coasts from any obligation or regulation which may be necessary to safeguard the revenue laws. It is only one which puts in a somewhat more explicit form and gives rather a wider range to the ordinary rights and obligations of the international law for safeguarding the interests of any local authority whose jurisdiction may be entered by strangers or aliens. Perhaps the Tribunal would allow me to take up the fifth Question after the adjournment.

DR. DE SAVORNIN LOHMAN: Will you allow me, before you enter upon the fifth Question, to put some questions to you? I shall put them to you now, but you may answer them at your convenience in the course of your argument. I draw your attention to two passages having connection with the first question, which I desire to put to you, and which has reference to the question of bays. At pp. 269 and 270 of the United States Case Appendix, there is a letter from Mr. Adams to Lord Bathurst, and, on p. 269, Mr. Adams says:—

“Your lordship did also express it as the intention of the British Government to exclude the fishing vessels of the United States, hereafter, from the liberty of fishing within one marine league of the shores of all the British territories in North America,”

And on p. 270 Mr. Adams says:—

“and declaring that they should continue to enjoy the right of fishing on the Grand Bank, and other places of common jurisdiction, and have the liberty of fishing and of drying and curing their fish within the exclusive British jurisdiction on the North American coasts,”

I suppose the meaning is that the Americans should have the right to fish on all the shores and also on the shores of the bays. If I am wrong you will be able to correct me. In his reply to Mr. Adams, at p. 273, Lord Bathurst does not deny that the Americans had that right of fishery along the shores, and at the end of his letter he complains only of the preoccupation of harbours and of smuggling. You will find that at the end of his letter on p. 277. The first question I want to put is this: Is there any document or fact before 1818 that proves that, either on the side of Great Britain or of the United States, in reference to the fishing rights of the United States, a dis-

inction is made between coasts and bays? Did not at that time before 1818, the disputes between the two Powers rather refer, first, to the right of fishing on the coast, taken in a general sense without making any distinction between coasts and bays, and secondly, to the question whether landing on the shores should be allowed or not?

That is the first question that I wish to draw your attention to. Then, in the same letter of Lord Bathurst's, p. 278 of the United States Case Appendix, I find these words:—

“yet they do feel that the enjoyment of the liberties, formerly used by the inhabitants of the United States, may be very conducive to their national and individual prosperity, though they should be placed under some modifications;”

These words clearly refer to the fishing rights on all the shores, coasts, and bays that are mentioned in the letter of Mr. Adams to Lord Bathurst. So, he speaks there of the enjoyment of the “liberties formerly used” and Mr. Monroe, p. 287, understands it in the same sense. Mr. Monroe writes to Mr. Adams:—

“It is willing to secure to our citizens the liberty stipulated by the treaty of 1783, under such regulations as will secure the benefit to both parties,”

We read, on p. 304 of the United States Case Appendix, that unexpectedly the President authorises the negotiators, on behalf of the United States to desist from the liberty of fishing and curing and drying fish within the British jurisdiction generally. In using the words “British Jurisdiction generally” I use the same words that Mr. Adams used in the letter that I first cited. This proposition is submitted by the American negotiators in the same terms as are now in the treaty. And in the British Argument, p. 92, it is observed that the language of the renunciation of the treaty of 1818 follows closely the language of the grant of 1783. These are the two questions that I want to put to you:

1089 Is it probable or not that the Americans, in renouncing the right of fishing within 3 miles of any of the coasts, bays, harbours and creeks, intended to distinguish, for the first time, coasts and bays, and to abandon a right that always, in their opinion, had been common to all nations?

Also:

Is it admissible or not to read the words of the renunciatory clause “any of the coasts, bays, creeks or harbours” as designating the coast in general, by enumerating its component parts in the same sense and in the same manner as is done in the treaty of 1783?

SIR W. ROBSON: I shall take the questions in the course of the argument which I propose to present on Question 5. They really cover the main features of my argument, so that I shall answer them



specifically, but I may perhaps precede my answer by the somewhat general statement of my argument in order to make the answer a little more clear and specific.

[Thereupon, at 12 o'clock, the Tribunal took a recess until 2 o'clock p. m.]

AFTERNOON SESSION, FRIDAY, JULY 29, 1910, 2 P. M.

THE PRESIDENT: Will you kindly continue, Mr. Attorney-General?

THE ATTORNEY-GENERAL, SIR WILLIAM ROBSON: I have just been able to procure a copy of the questions that Dr. Lohman has been kind enough to put to me, and with his permission I should like to give short provisional answers to them at once, and then deal with them afterwards in very full detail as I go through the argument. I should like incidentally to give answers indicating the way in which I shall propose to deal with these questions in my argument.

The first question is:—

“Is there any document or fact before 1818 that proves that either on the side of Great Britain or of the United States, in reference to the fishing rights of the United States, a distinction is made between coasts and bays?”

With regard to that I think I shall show—I hope I am not too confident in saying this—I shall show conclusively that both parties, Great Britain and the United States, treated bays (which are of course admittedly component parts of the coast) as being for political and territorial purposes in a different category altogether to the rest of the coast. That is to say, although bays may be treated geographically and properly as component parts of coasts, yet different considerations were applied by both countries to bays to what were applied to the open coast, or the coast generally with regard to all territorial purposes, including the right of fishing. I shall show that, and I am much obliged to Dr. Lohman for bringing my argument to definite points by which it can be tested. I shall show that Great Britain and the United States, both by international documents and also by the correspondence antecedent to this treaty, by their conduct, their treaties, and their diplomacy—all these powers concerned in British North America before 1818—put bays in a separate category to that of coasts generally. Then the question of Dr. Lohman goes on:—

“Did not, at that time, before 1818, the disputes between the two powers rather refer first to the right of fishing on the coast taken in a general sense, without making any distinction between coasts and bays; and secondly, to the question whether landing on the shores should be allowed or not?”

I may say—because this is all part of the first question—that in reference to the extracts from Mr. Adams' letters I shall show, I hope, most conclusively, that Mr. Adams in these letters is speak-

ing, as I may say, a little elliptically, that is to say, he is not on each occasion when he refers to our jurisdiction, describing it in full, because it is not at that moment the immediate limit of the jurisdiction that is under consideration, the question of bays was not in his mind in those letters. In those letters he was dealing with the dispute that had arisen in relation to the "Jaseur."

1090 It will be remembered that in 1815 the "Jaseur" had been warning American vessels not to operate within 60 miles of the coast; so that the question of bays in those letters was not in the mind of Mr. Adams at all. And therefore, when he is referring to our maritime jurisdiction as being within 3 miles of the coast, all that he has in his mind, all that he is thinking of, is: "You have got a limited territorial water, but beyond that is the high seas. And these vessels are being warned by the 'Jaseur' off the high seas." That is what he is protesting against at that time. I will show quite conclusively that it had been brought to the knowledge of Mr. Adams at that time or certainly (because I have the documents) to the knowledge of the Secretary of State for the United States, Mr. Monroe, that in 1815, the Treaty of Ghent having been concluded, and the treaty of 1818 not having come under negotiation, it was the intention of England, expressed by Lord Bathurst in a clear document, to exclude the United States from the bays. And that very day that Mr. Adams is writing, the 25th September, the letter of the 7th September which Lord Bathurst wrote to Mr. Baker, saying that bays were to be excluded—all in the same year, 1815—was on its way, was on the water on its way to Mr. Baker, telling him what Lord Bathurst had also told Mr. Adams (though I think he had not remembered it, or had not noticed it), that bays would in future be included among the parts that United States vessels were not to enter. That was in 1815, before this treaty began to be negotiated. So that, if Mr. Adams had been thinking of bays, if his attention had been directed to some capture which was in a bay, he would then, undoubtedly, have given effect to the information which he certainly had, that we meant to keep them not only 3 miles from the coasts, but also that we meant to keep them out of the bays. That deals with Mr. Adams's letter.

The other part of the first question said:—

"Did not the disputes (previously to 1818) refer rather . . . to the right of fishing on the coast?"

Well, there one must remember that, under the treaty of 1783, no distinction so far as fishing was concerned existed between bays and coasts. So we must not look in the correspondence and letters under that treaty for anything very explicit on that point. Under the treaty of 1783 they had the right to fish along the coasts and in the



bays, so there was no dispute, then, as between coasts and bays—none.

But the distinction between coasts and bays, though not illustrated in any disputes between the parties at that time, was, I shall show, clearly known to all, known to every one of them, and admitted in explicit terms by every one of them, and in no single case contradicted.

In fact, I think my evidence on that will go very far. Then, as to the other part of the question, the disputes relating to the landing on the shores, of course that was a matter of negotiation, of bargain. But I shall show this: that the distinction between coasts generally and bays as component parts of coasts—because I am not pretending that a bay was something which was not part of a coast, that is to say, there is a coast around the bay, as there is a coast running around the rest of the territory—but the distinction between coasts and bays was indicated and acted upon in both the two material treaties. Although a bay is a component part of a coast, it may be specified and dealt with separately and independently for a particular purpose. The bay was so specified, and it was so dealt with under the treaty of 1783. You have your right of fishing given generally on the coasts. You have your right of drying and curing given specifically on the unsettled bays and on all the coasts. On the whole of the coast you have your right of fishing given, and then a particular component part of the coast, namely, the bay, is picked out for a special purpose—the right of drying and curing. In the same way, you have a very explicit distinction between the two in the treaty of 1818. There it is very remarkable. And at a later period of my argument I hope I shall show that it is conclusive. You deal with coasts generally in Article 1 of the treaty of 1818, you give rights of fishing on the coasts generally. I pass for the moment the point as to whether that includes bays. I am leaving Question 6 alone for the moment. You give a right to fish on coasts generally, and then, by the same article, you deal with bays; you give bays in one case, and you do not in another. You give bays in the case of Labrador for the right of fishing; you do not give them—at least I say you do not; perhaps a different view may be taken of this—you do not give them specifically, at all events, on Newfoundland. But there is a still more marked distinction. It is suggested that bays, harbours and creeks are added to the word “coasts” as being a summing-up of the component parts of the coasts; so that the word “coasts” may be treated, as in an equation, as meaning coasts, bays, harbours and creeks.

1091 They may not or may mean the same thing. I am not concerned. It does not matter to me to say they do not. The word “coast” may be used quite generally to include bays, harbours, and creeks, or, instead of using the word “coast,” you may divide it

into its component parts and say "coasts, bays, harbours and creeks." What do you mean when you do that? Are you adding words uselessly, or are you adding words with a definite purpose in order to fulfil a definite function? It is very easy to ascertain, by looking at the clause itself. If the words are just thrown in, as lawyers often do—they first of all use a word which is quite sufficient for its purpose, and then begin to think: "Well, now, have we got that all right? Two or three extra words will not do any harm," and they throw them in—If the words "bays, harbors and creeks" are thrown in like that, we can probably find out by looking at the clause itself and seeing whether bays, harbours, and creeks are treated in a different way, or are intended to fulfil some different function or point to some other purpose. Now, look at the article of the treaty and see. There bays are picked out from among the other component parts of a coast, and the treaty says with regard to some of them, that is, those that are called, not very accurately, the non-treaty coasts—because they are just as much subject to treaty as the others, but not to the right of fishing—and the article says with regard to some of them: "You shall not enter those bays." Now that clearly shows that you cannot treat the word "bay" in that case as though it were a mere summing-up of the word "coast." You cannot there say, in that case, that 3 miles from a bay means 3 miles from any part of the coast, using the word "coast" now in its general sense. If you use the word "coast" in its general sense, 3 miles from any part of the coast, as Dr. Lohman in his question points out to me, might be considered as meaning 3 miles from any part of a line which follows the sinuosities of the coast. That writes "bays" out altogether. Are they intended to be written out, or struck out? Are they intended to be treated as superfluous words? No; because when we come to another part of the treaty we find that this line is not intended to be drawn within 3 miles of the whole of the coast, because, whenever you come to a bay you have to keep 3 miles away—not from the coast of the bay, but—from the bay. Now, mark how this is made absolutely certain. It is made absolutely certain that the bay is to be treated there as a separate unit, geographically a part of the coast if you like, because it says, in the proviso to the renunciation:—

"American fishermen shall be admitted to enter such bays"

Of course, if their renunciation simply related to a 3-mile line running around the coast generally, they would enter the bays; they would have the right, because the 3-mile limit would go into each bay, and they would follow it. But here that is clearly not the intention to treat "coast" in that sense. "Coast" here is intended to be treated in a sense which admits of a 3-mile line going, not all around the coast, but such part of the coast as is open, and then, when it comes to a bay, it must close that bay, because here is a proviso which says



the particular purposes for which the bay may be entered. It is to be entered only for wood and water and in distress; and then come the significant words, "and for no other purpose."

DR. DE SAVORNIN LOHMAN: May I interrupt you at this moment, Sir William? You said yesterday that it was not allowed to put a word in the treaty that was not in it; and I agree with you. You will, however, make one exception that, where you have a clause that will not make sense without inserting a word, you may be allowed to insert that word?

SIR W. ROBSON: A good deal depends on the word you select for the purpose; but still——

DR. DE SAVORNIN LOHMAN: I think you will agree with me when I say that when the word is used here that they shall be permitted to "enter" the bay, it was not the intention of the parties to give them permission to enter the bays, and then, when they entered the bays, to say that they could not have wood, water and shelter. The intention was to give them the right to have wood and shelter and water; and therefore they must go on the shores. That was the intention when the words are used here "to enter" the bays. That can have no other signification than to say: "You may enter the bays in order to go on the shores of the bays, to have your wood, and to have your water, and to have your shelter."

Now I would ask you whether it makes any difference, if you say it is allowed to enter the bays, or if you say it is allowed to enter the distance of 3 miles of the bays. The intention was not to say: 1092 "You can enter the bays," but it was to give them the right to go on the shores of the bays. And I ask you whether it makes any difference if you say it is allowed to go in the bays in order to go on shore, or say it is allowed to pass the 3-mile limit of the bays to go on shore?

SIR W. ROBSON: I think there is just this difference, if Dr. Lohman will allow me, and that brings us very close to the point. It does not say here: "You may enter the 3-mile limit for these purposes."

DR. DE SAVORNIN LOHMAN: No.

SIR W. ROBSON: It does not say so, in fact. Let me deal, for a moment, with that. Why does it not say that? Wood, water and the exigencies of distress, if they could be safely met and properly met on the open coast, they would be. But, in truth, it is not the open coast which is useful, not the mere landing which is useful. It wants something more than that. They are at liberty to land, or at least they might be given liberty to land, and yet it would not satisfy them. It is not the land they want. It is the shelter of the bay. It is not the 3 miles of the coast that they are troubling about; it is the shelter of the bay. They may or may not want to land. I am speaking, now,

of what of course one could see by looking at the map, when I say that most of these little creeks themselves give sufficient shelter.

DR. DE SAVORNIN LOHMAN: But as to the purchasing of wood?

SIR W. ROBSON: That, of course, is a different purpose. I am speaking, for the moment, of shelter only—as to the purpose of shelter only. They do not want to do more than enter the bays. Now, then, they also want, sometimes, wood and water. For that purpose they do not ask for liberty to land upon the open coast, because the open coast is not convenient to them. They want something quite different from the open coast. They want a place where they can rest, and procure their wood and water. The bays, being more or less harbours, are more likely to contain traces of previous navigators who have come there and put up their little sheds, and perhaps left some shelter behind them. But, anyhow, they say: “What we want is the bay. We may or may not want wood or water. We may or may not want any other accommodations; but we want the shelter of the headlands. And so we ask permission to enter that bay;” and the treaty says: “You shall enter that bay.” Nobody cares about open coast in this connection at all. “You shall enter the bay; and when you have got there you shall shelter there. That is to say, you shall lie up, under the lee of the headlands.” That is the nautical expression, meaning protected from the wind. “You may lie there in peace, anchor and rest, but you shall not fish there.” In other words, bays being treated quite generally, here is an explicit prohibition against fishing in a bay.

DR. DE SAVORNIN LOHMAN: Oh, yes.

SIR W. ROBSON: And the only question is: “What do you mean by the word ‘bay’ in that connection?” That is all. So that, if I can bring it home to the minds of my Tribunal that the word “bay” is used in its natural and unrestricted sense—which, of course, is another part of my argument—this clause means that the United States have asked for the liberty, and Great Britain has granted the liberty, of entering an ordinary geographical bay; and in giving them that liberty, Great Britain has said to them: “You may land. Of course that is one of your liberties. That is not the only liberty. You may land; you may shelter; but you may not fish.” I think that if I now proceed to my argument, and develop this point as I go along, I will perhaps have sufficiently answered the question for the moment.

Then there is the second question:—

“Is it probable or not that the Americans, in renouncing the right of fishing within three miles of any of the coasts, bays, harbours, and creeks, intended to distinguish, for the first time, coasts and bays and to abandon a right that always, in their opinion, had been common to all nations?”



I had better answer that question by at once dealing with the facts to which it refers; because, after all, it is not much use answering the question unless I deal with the basis of fact upon which it is built.

We say that the Americans did not, for the first time, by the treaty of 1818, distinguish coasts and bays. It is a very essential part of our argument, and I may be speaking too confidently—I hope I am  
1093 not—if I say that we can put it beyond a doubt that, until the negotiations before the treaty of 1818—I will not say in 1818, but until the negotiations immediately anterior to that treaty—the distinction between coasts in general and that part of the coast to be found within a bay—the coast of embayed waters, to use an old expression—had always been acknowledged by the United States. Mr. Adams chose, in his letters, continually to drop out the word “bays” when the word “bays” was put to him—perhaps because it was not immediately pertinent to the subject of his letter. As I have just pointed out in the case of the “Jaseur,” the quarrel did not turn on bays. It turned upon the high seas—against the inshore fisheries; and I think that perhaps explains why he did not use it. But he did not use it. But the words “maritime jurisdiction” which were used by Mr. Adams, and on which Mr. Warren laid so much stress, I will show beyond a doubt, to the knowledge of everybody on the United States side—and not only to the knowledge, but to the continual assertion of everybody on the side of Great Britain—expressly included bays. I will show that everybody considered bays as being part of our maritime jurisdiction.

Mr. Warren thinks that maritime jurisdiction related only to the 3 miles around the coasts—just like Mr. Adams, in the letter to which Dr. Lohman has drawn my attention. Mr. Adams is speaking of 3 miles around the coast, but Mr. Adams did not mean to say that bays were outside of our jurisdiction. He did not mean to cut bays out. He could not have done so, when I come to show the letters which had been brought to his knowledge before that time. He only used that expression shortly, because it was sufficient for his immediate purpose. He was comparing what was within our jurisdiction and what was without our jurisdiction on the high seas, and he used the 3-mile limit as a short and compendious way of referring to it. But Lord Bathurst never accepted that, and I will show the letters—we have now got one which was missing—all of which will prove conclusively that Lord Bathurst laid the greatest stress on “bays” as being within our jurisdiction, asserted it, and reasserted it again and again.

So that my answer to the second question is that they did not for the first time acknowledge this distinction in 1818. They were acknowledging a distinction in 1818 which they had never disputed, and in every form had asserted, by international documents, by correspondence, and by their conduct.

The next question is:—

“Is it admissible or not to read the words of the renunciatory clause ‘any of the coasts, bays, creeks or harbours’ as designating the coast in general, by enumerating its component parts in the same sense and in the same manner as is done in the treaty of 1783?”

Well, in the treaty of 1783 you are giving, and you are giving all, without distinction. You are giving the coast and the bays, and the very fact that you should mention them in 1783 shows that, if only by habit, the diplomatists of the period did always, when they were talking about jurisdiction on coast, specify bays—that is, they thought of them. Even though they were uselessly inserted, they were inserted because it was their habit always to deal with bays as a separate class; and they are distinguished even there, although you have liberty to fish in 1783 on every part of the coast of Newfoundland, and on all the coasts which British fishermen had used. In spite of that it is thought necessary to add to “coasts” the word “bays.” And even then a distinction is made between one kind of bay and another—that is to say, between the settled bay and the unsettled bay. But no distinction—mark it—is made between the bay which is territorial and the bay which is non-territorial, because there was no such distinction; they were all territorial. Every nation regarded its bays as being within the body of that nation itself, and no nation more strongly than the United States. So that, so far from renouncing something in 1818 which they had always regarded as being a common right, they were dealing with bays on the footing which again and again they had asserted as being a footing common to both England and themselves, namely, territorially within their boundary.

Then, in the same way, in 1818, again, in the most explicit way, and in the governing document, after all the negotiators had done their work, after all the letters had been written, and the result comes to be embodied in a contract, what do they do? Do they treat bays as part of the coast? No. Or do they ignore bays? Because all that they had to do, on the footing suggested by the United States, was for the gentlemen who were making the renunciation to say: “We renounce the coasts. We will not fish within 3 miles of the coast of His Majesty’s dominions.” Why did they not say that? If the United States are right that is all they need have said. They did not say it. They said: “We will not go within 3 marine  
1094 miles of the coasts, and we will not go within 3 marine miles  
of the bay”—not of the coast of the bay; not at all; but,  
“We will not go within 3 marine miles of the entrance of the bay.” And then, later on, they say that, “After all, we may want to go into the bay, not merely to land—landing is one of the things we want, but not the only thing—we may want to go into it and rest



there, without obtaining wood or water; we may have an abundance of wood and water, but we want to rest there, protected by its headlands, or protected by some other favourable circumstance attached to a bay. So, therefore, we will take the right"—to do what? To go within 3 miles of the coast? That is not what they say. "We will take the right to enter the bay"—showing that when they have used the word "coast"—and "bay" as a component part of a coast—they introduced the word "bay" specially, specifically, in order to show that it is to be treated by itself. Although geographically part of the coast, yet the coast-line is to pass in front of it; and they say: "Now, let us cross that imaginary coast-line; let us enter the bay, and when we get inside the bay we promise you that we will not do anything except shelter or repair, or ask for wood or water on the land, if we want it." In other words: "We go into that bay, treated as a unit—treated as a distinct component part—and, treating the bay in that way, we will take the right to enter it, and, having got into it, we will obey your laws and will not fish in it." They will not fish "on" the bay. The expression there means really "in the bay." But they say: "We will not enter the bay; we will not fish on the coast or on the bay." I say that, although it makes no difference and serves the purpose as it is, perhaps the more accurate and usual way of saying it would have been "on the coast" or "in the bay." But they have said quite enough: "We will not fish on the coast; we will not fish on the bay; and not only will we not fish on the bay, but we will not enter the bay except for those purposes."

SIR CHARLES FITZPATRICK: Pardon me, Mr. Attorney-General, but before you leave that, may I make this observation: If the parties had used the word "coasts" alone, you say, then it would be a possible construction of that clause of the treaty that the Americans would be excluded from the 3-mile limit from the shore. If the parties intended to avoid that, and to exclude the Americans from the bays, harbours, and creeks, what words would they have used?

SIR W. ROBSON: Well, they would have been more skilful in the English language than I am if they could have found any other than the words they have got. That is not a bad rule of construction. When it is contended that a party meant by certain words a certain thing, it is not a bad test to ask: If he had wanted to express the meaning, what other words could he have used? He could not have used any others. He could not make it more explicit. He says: "I want to keep you away from my coast. I will not let you come within 3 miles of my shore." Well, now, if he says "3 miles of the shore," that means all the way around the shore, including the bays—3 miles from land. But he does not say that. He says: "I am not content with keeping you 3 miles from land, because there are certain indenta-

tions in my coast which would put my land under your power, even though you still remained on the water and more than 3 miles away from the land." That is the reason why bays are separately treated. "I do not like," says not only England, but every other nation that has a bay, "to have your ships of war or any other ships coming into a position in which you get a great strategic advantage against me. As long as I have got you well out in front of me, 3 miles beyond my coast, then I know where you are; but when I have you creeping under my headlands, you get two advantages: you get one supreme advantage first of all—a position of shelter, in which you may await political events." Imagine a possibility of an outbreak of war. One nation desires to make a naval demonstration—a most mischievous kind of international amusement. It wants to make a naval demonstration, which, of course, is a thing that may be followed, and very often is followed, by a war. It is a very unpleasant thing to go and lie up 3 miles off a coast for great ships of war or any other ships. But what pleasure to be able to put your ships in a sheltered bay! Three miles off the coast of a bay is a very different thing to 3 miles off an open coast. In an open coast you have full sweep of the greatest storms.

DR. DE SAVORNIN LOHMAN: If you will permit me, Sir William: I have not spoken, in the questions that I put, of the jurisdiction in general. I have confined my questions to documents in effect in reference to the fishing rights of the United States—not in general.

1095 SIR W. ROBSON: I am much obliged, Sir. I quite appreciate that. Your question did relate to fishing rights, and, perhaps, I have not made myself quite clear. I was only dealing there with the wider question in order to explain how it is that the parties came to distinguish between "bay" and "coast," that is all. But so far as fishing rights are concerned, up to 1812 there had been no dispute, because they had enjoyed them under the treaty of 1783. They enjoyed them from 1783 to 1812 in peace; and then from 1812, of course, there was war, and they were not allowed to come back when peace was made in 1814. They were not allowed to come back. That is very material. They were all kept out of bays and everything else. Then, of course, came the treaty of 1818.

So that, as far as fishing was concerned, there had not been much opportunity for dispute.

But, on the other question that Dr. Lohman is good enough to put to me: "Were bays treated as a component part of a coast, or as something different from the coast in general?" I wish to say they were not treated as something different from the coast in the sense that they did not form part of what is known as "coast." You can use the word "coast" in a sense wide enough to cover every bay and



every inlet; it is the land really; but they were treated as a component part of a coast to be put on an absolutely different footing, for every international purpose, to the rest of the coast. That is how I answer the question, and I am very glad indeed to have questions which are here like lighthouses or buoys—if I may revert to the imagery of the morning—guiding me to the point in each of these cases as I go through my argument; because the whole of my argument will be directed really to these questions—sometimes closely and sometimes remotely, but always, I hope, materially, and bearing them in mind.

In dealing with this controversy one always has the difficulty which arises in Question 1, and to some extent complicates Question 5, of the different kinds of fisheries, and the disputes that arose about them.

There were two distinct kinds of fisheries, those which the world at large claimed as being common to mankind, and as to which there were many disputes between England and the rest of the world. England undoubtedly was claiming jurisdiction, property, at one time in the high seas. It was against that claim that the United States directed its strongest protests. They were entirely against any claim on the part of Great Britain to appropriate that part of the high seas which is indicated by these dotted lines on the map here showing the banks. Nobody could say that they were territorial in the ordinary national sense of the word, and the United States was always protesting against that. And one has to remember that in reading their letters.

But when it comes to maritime jurisdiction of the territorial character, that is to say, jurisdiction over waters that were adjacent to the land, then you will find that the United States from the beginning was just as insistent as any other nation in including bays within that territorial jurisdiction. One can see in a moment what an immense difference there is between claiming a jurisdiction here, for instance (indicating on map)—there is Banquereau—as being under the authority of the English Crown, and here (indicating on map). You cannot mark it by boundaries. Nobody pretends to defend it by ships of war. In the sense that you really take those boundaries there, they are hundreds of feet below the surface. They could not be treated as being in your jurisdiction, leaving all these parts intervening (indicating on map) as being common seas. So that we gave up our claims to that jurisdiction.

Mark the difference between such a jurisdiction as that, against which Mr. Adams declaimed, and a jurisdiction like this (indicating on map), or that, or that (indicating). There is all the difference in the world, from the point of view of the practical man.

Consider Chaleur Bay, and just imagine any nation consenting, if it knew what it was about, to throw that open to the war-ships of the

world. They could rest there with comfort; and the only persons that could not rest with comfort, while they were there, would be all the people here (indicating on map) and the rest of the world. It would be impossible; and therefore I lay stress on this question of probability, before we come to treaties, before we come to documents and correspondence; just look at the broad phase of the thing; look at the way in which men are likely to operate. We have not here on this map the coast of America, or else I could point out Chesapeake Bay, which is a bay according to the United States; and Chesapeake Bay is every bit as much open sea as Chaleur Bay is. So far as that

is concerned nobody can distinguish between Chesapeake Bay 1096 and Chaleur or Miramichi Bay or these bays (indicating on map). Take, for instance, St. George's Bay. That looks a fairly open bay. In the map which was before the negotiators in 1783 and afterwards, that is, the Mitchell map, St. George's Bay has a much narrower entrance, but I am quite content to take it as it is there. Imagine vessels being allowed to come within the 3-mile limit and able to command these two coasts. You may or may not have your forts on such coasts. Of course if you had forts on shore you would command the vessel to the vessel's detriment. But a vessel may come in here in time of peace and occupy a position which may enable it to command all the unfortified towns which might spring up there, and yet lie in shelter. That is the materiality of the point. It is not, when we are discussing questions of territoriality, merely a question of property—who is to have the right to catch the herring here. That is an incident of jurisdiction; but it is not the whole purpose of the jurisdiction. A far more vital purpose of jurisdiction is defence, and when these nations were claiming these bays they were not thinking about cod-fish. I believe, as Sir James Winter says, there were none there. He offered very nobly to give the United States an unrestricted right of entry to all the bays, and some of us thought: "This is Napoleonic in its magnanimity; this is tremendous in its generosity." But Mr. Justice Gray unfortunately disposed of that aspect of the case by asking Sir James: "Are there any fish there?" "None," said Sir James—so that was the extent of his magnanimity.

But it was not the fish they were thinking about; it was defensibility, when they laid down this question of bays. No mere cannon shots. Jurists talk about cannon shots because they like some easy measurement; but the statesmen and diplomatists were thinking of something different to that. They did not tie themselves to cannon shots; they meant: "Can I by ships of war or by any other organisation (in modern times it would be by mines), can I defend that bit of my coast so as to keep them well out? I will not have them in here to command my undefended towns here and my undefended towns there. I will keep them well out, 3 miles from there, until war



is declared, and then I will take my chances. It is not a question of picking a few passages out of the letters of Mr. Adams, or anything of that kind. Before 1818 everybody agreed—statesmen and diplomats and navy men and everybody else—that the bays are within the maritime jurisdiction. And Mr. Warren, who presented a very able argument upon this part of the case, got on excellently when once he had assumed that maritime jurisdiction meant only 3 miles from the shore. As soon as you can ignore bays and treat your maritime jurisdiction as thus confined, it is a very easy process of reasoning. But the question is, are you entitled to ignore bays? Let us begin at the beginning. I will not be long, because, after all, the ground has been trod before me; but still I must recall it in order to put the case before the Tribunal as a whole upon this point. But I will avoid repetition.

Take the very first use in which you have the word “bays”—the first international document in which the word “bays” is used, because that is what we have to find out. In what sense was the word “bays” used in the treaty of 1783? I take the treaty of 1783 because we are all agreed—Mr. Warren agreed, the printed pleadings of the United States agree, I agree—that the words in the treaty of 1818 relating to bays were taken from the treaty of 1783. The United States Argument says at p. 143 and p. 230—first on p. 143:—

“The language in the proposed article, ‘coasts, bays, creeks or harbours of His Britannic Majesty’s Dominions in America’ was gathered from the treaty of 1783.”

There are a great many other such references. It is the same right away through their pages. I need not give them all. There are 144, 147, 228, 229—passages on all these pages show that the words were taken from the treaty of 1783. And then on p. 230, which is the only one I thought it worth while to note because it is so complete, it is said:—

“It is submitted, then, that the treaty of 1818 was in many respects a Chinese copy of the treaty of 1783.”

They copied literally, and unintelligently I suppose it is intended to imply, but anyhow they did copy the words. Perhaps I had better read some of these references, if there is any doubt on this point—I thought it was all agreed. P. 143, it says in the last paragraph:—

“The language in the proposed article, ‘coasts, bays, creeks or harbours of His Britannic Majesty’s Dominions in America’ was gathered from the treaty of 1783.”

1097 And then the same is repeated on p. 147 and on p. 228—that is a very useful paragraph. It says (just under the heading “Treaty of 1783”) :—

“It is proposed to show that the language of the treaty of 1818 was drawn from the treaty of 1783 and has the same meaning in both treaties,”

It goes on to say:—

“and that no such distinction was intended to be made.”

I think that, as long as the other side admit—they not only admit but they assert, that the phrase which contains the word “bays” was taken from the treaty of 1783, put into the treaty of 1818, and there retained the same meaning as it had in the treaty of 1783—that carries my argument a very long way. It carries the argument a very long way, and the same proposition is reaffirmed in the speeches of Senator Turner and Mr. Warren both.

So that now, I hope, I may treat this as agreed. I am not without my fears that the distinguished statesman and lawyer who follows me will try to get out of these admissions, because I think he will find them slightly inconvenient in the course of his argument.

I am now going to deal with the treaty of 1783, and construe it as the parties understood it at that date. The line of my argument is going to be this: I am going to take up the clause in the treaty of 1783, construe it as at that date; then I am going to ask whether anything happened between 1783 and 1818 to give it any different meaning in 1818 to what it had in 1783.

I am going to show that nothing had happened to give it any different meaning, and that it meant the same thing in one treaty as in another; and yet it may be said I am undertaking an unnecessary task, because the United States admit it, and the reason why I am undertaking the task is this, that I shall show so conclusively in 1783 that bays were included in our jurisdiction, that I think and hope Senator Root will find it rather difficult to get over the construction in 1783. I anticipate that he will begin to say: Oh well, something had happened in the meantime to give it a different meaning in 1818. Well, if he does, I hope the Tribunal will bear in mind both this admission in the United States Argument, and the argument I am about to present, because I want to make it quite clear that in the construction which I have endeavoured to put on the words in 1783—

SIR CHARLES FITZPATRICK: What words?

SIR W. ROBSON: “Bays and creeks of his Majesty’s dominions.” And, I say the word “bays” meant the same thing in both treaties, the same bays that were given in the treaty of 1783 are renounced in 1818, and in 1783 the bays that were given were all bays, and in 1818 all bays were renounced. In 1783 the word “bays” was used in its geographical sense, meaning everything which we have got here upon the map before us is a bay, without an idea in the head of a single framer of that statement, that anything such as a 6-mile bay existed, or ever had existed, or ever would exist. My course is easy from 1783.

SIR CHARLES FITZPATRICK: And I understand your submission to be that “coast” did not include “bays” at that time?



SIR W. ROBSON: At that time coast and bays were always treated differently for political purposes. I hesitate to take Sir Charles' questions and answer it by a plain "yes" or "no."

SIR CHARLES FITZPATRICK: It is not my question. I am asking the meaning of your submission.

SIR W. ROBSON: That is my submission; because I had to keep in mind Question 6 which is really a different question to that which I am arguing in No. 5, and I should be sorry if the two became confused at all. Question 6 stands on quite a different footing really to Question 5, because I do not deny that you may use the word "coast" generally or popularly so as to include "bays."

Of course, whether it has been so used in any particular treaty depends upon the wording of that treaty, but whenever you are using the word "coast" in a way which makes it important to consider whether "bays" are included or not, you will find invariably the statesmen of that time in that part of the world always took care to specify that particular component part of a coast called a bay, and treat it as different to the open coast. That is all. They always treated it as different to the open coast, and said, now we are going to keep it.

In their minds, all through those years, through those great wars, when North America found itself in the quarrels of Europe—all through those great wars, when nations were so solicitous about their defences, at that time in this part everybody said we must have these "bays," because to allow ships of war to rest, waiting for the declaration of war in these sheltered places, even in the Bay of Fundy (a most dangerous place), was a thing which the owners of the territory could not be expected to allow, and nobody interested in that territory ever did allow, neither France, nor the United States, nor England, nor even a country so remotely interested as Spain. They all treated the jurisdiction of England as extending to bays, and the moment one gets that into one's mind, all those questions of maritime jurisdiction and so forth are quite intelligible. It is only when that fundamental fact is ignored or forgotten, that then the words "maritime jurisdiction" begin to be a source of difficulty.

I therefore begin with the admission that in the treaty of 1783 I may construe the words with reference to that time, and whatever construction I put upon those words "bays of His Majesty's dominions," is applied equally to the same words in the treaty of 1818.

Now then, let us see what in 1783 was the meaning attached to the word "bays" from the territorial point of view? How did people treat the word? And, I look first of all to treaties.

I will go first to them. There are not many of them.

England and France had been fighting for supremacy in British North America for a long time before the events which we have now

to deal with began to happen, and they did not have many treaties; their fighting was pretty continuous.

But, as early as 1686 they felt it necessary to deal with the question of their jurisdiction. It was only as between themselves, but so far as they were concerned they were the whole world in British North America, just as Spain was the whole world further south. Spain asserted rights, and there were really very few to contest them, but Spain ruled almost alone. In British North America, England and France divided dominion, and their influence there with regard to territoriality of bays was really the only influence to be considered. There was no other. They had never heard or thought in those times of 3-mile lines or 6-mile bays, and they sat down in 1686 to make the treaty which appears on p. 6 of the British Case Appendix.

And this treaty, though it is dated 1686, is used as a model five years before the treaty of 1783, because in 1778 this very treaty was almost copied by France and the United States: It begins:—

“The subjects, inhabitants, merchants, commanders of ships, masters and mariners, of the kingdoms, provinces and dominions of each King respectively, shall abstain and forbear to trade and fish in all the places possessed or which shall be possessed by one or the other party in America, viz. the King of Great Britain’s subjects shall not drive their commerce and trade, nor fish in the havens, bays, creeks, roads, shoals or places, which the Most Christian King holds or shall hereafter hold in America; and in like manner, the Most Christian King’s subjects shall not drive their commerce and trade, nor fish in the havens, bays, creeks, roads, shoals or places, which the King of Great Britain possesses or shall hereafter possess in America. And if any ship or vessel shall be found trading or fishing contrary to the tenor of this Treaty, the said ship or vessel, with its lading, proof being made thereof, shall be confiscated; nevertheless, the party who shall find himself aggrieved by such sentence or confiscation, shall have liberty to apply himself to the Privy Council of that King,”

Now, there are the two Powers concerned sitting down and saying, so far as we are concerned, we will each of us treat our bays as territorial. No question there, again, about one kind of bay being territorial, and another not, because at this very time they were making claims to the maritime jurisdiction, and a hundred years later claims to maritime jurisdiction, which came 90 miles out from shore. So of course it was a very easy thing to claim the bays. But there, at the beginning of the history in British North America, at the beginning, I was going to say, of its civilised history, I mean the history which records the quarrels of civilised nations—however, at the beginning of the history of British North America, you have, then, two nations sitting down and saying we are the only people concerned in this territory, and we will agree with each other to treat our bays as part of our territory, and neither party shall trade in them or fish in them. That is another way of saying they shall not enter them.



If they are found trading or fishing there, absolute confiscation is the result.

1099 Well now, can any one suggest that there is any limitation there on the word? None.

I wish to be followed closely by the United States in this, to see at what point of time they say that these nations began to treat "bays" in the same way as the rest of the coast. They are not doing it here. They do not say that nobody shall come on the coast under penalty of confiscation. They only say you shall not go into those bays which we regard as our own territory. That is in 1686.

Next comes 1713. There, again, exactly the same policy adopted and treated as internationally permissible by treaty. That is at the same page:—

"The said Most Christian King shall restore to the kingdom and Queen of Great Britain, to be possessed in full right for ever, the Bay and Straits, of Hudson,"

Now, they gave there to Great Britain the whole Bay of Hudson, an enormous gift, undoubtedly covering what would ordinarily be considered as international waters, "together with all lands, seas, sea coasts, rivers, and places situate in the said bay." The whole sea was given there. Later on there is a passage which I think is really not quite fair of the negotiators to the treaty of 1818, when they are trying to vindicate their own sagacity. They say it is true we did allow that we were not to prejudice the rights of the Hudson's Bay Company, but after all, we can contend that their rights are limited to the 3 miles from the coast. Well, that was a most unfair suggestion, because they must have known perfectly well that the rights of the Hudson's Bay Company were, as is indicated by this treaty, exclusive over the whole bay. They knew that perfectly well, that the rights of that company were actually exclusive over the whole of this bay.

And then it goes on, in section 12, at the end, I need not read the whole of it, but Nova Scotia was to be ceded to Great Britain, and how was it to be ceded, what was the form of it, what is it to carry with it—the cession?

"and that in such ample manner and form, that the subjects of the Most Christian King shall hereafter be excluded from all kind of fishing in the said seas, bays, and other places,"

It is rather interesting to note that word "said" because the reference to bays and seas does not appear in the earlier part, and yet the word "said" is referred to as if it was used on some previous occasion where "bays" had been used. It had not been used.

Then, why do they speak of "the said bays"? Simply, because having given or ceded Nova Scotia it is assumed it carries the "bays" with it. The mere cession of the land was by them taken as proving

that bays and seas and land had all gone with it. So they call it the "said bays," although "bays" had not been particularly mentioned, and then it gives this enormous stretch of maritime jurisdiction, 30 leagues from the coast—an enormous stretch of jurisdiction.

Again I ask, as I come to each step (there are not many of them, so that I want to be particular as to each), can anybody here pretend that a bay is used in some limited sense, meaning small bays, 6-mile bays? Nothing of the kind. There was not even a 3-mile limit talked of then. Only a few jurists here and there had been talking of cannon-shots, and certainly nobody in Paris or London had ever heard anything about them.

Then I come to clause 13, the cession of Newfoundland, and there also it gives an immense stretch of maritime jurisdiction:—

"But it shall be allowed to the subjects of France to catch fish, and to dry them on land, in that part only, and in no other besides that of the said Island of Newfoundland,"

and then it defines the French right.

Then we come to 1763; 1763 was the cession of Canada.

There we have got the treaty between France and Spain. I do not think anything is said about "bays," but the antecedent treaties of 1686 and 1713 are repeated, and 15 leagues are indicated as the maritime jurisdiction around Cape Breton.

The Tribunal are familiar with the terms of that treaty. It does not deal with "bays" and does not need to deal with them. They pass with the land, and so there is no occasion to say anything about them, and nothing about them is said.

Then we come to 1783, which is the one with which we are all so familiar. There you get a distinction drawn in the treaty itself. And, one must not treat that distinction as immaterial, unless there is some good ground for doing so.

I am going to pause here and deal very shortly with the 1100 authorities at this time, 1783. I am not going beyond them.

I am not going to trouble about authorities which are already put in evidence, but just going to refer to a particular word or two. I am only going to put in two new authorities. I think they will show beyond a doubt what the state of international law was at that time, and how completely the consideration of the authorities negatives the suggestion that at that time "bays" were treated as open sea, or parts of the open sea.

In the treaties relating to that part of the world it is quite clear there is not a word or syllable to support any such contention. They support the opposite contention, that every power claimed and kept its own bays and treated them differently from the rest of the coast.

Now, first of all we have had Grotius. I do not need to refer except to two points in what he says. He says bays may be part of the



territory if not too large in proportion to the adjacent land. He never treats bays on the same footing as the rest of the coast. He first of all describes what a bay is:—

“By this Instance it seems to appear, that the Property and Dominion of the Sea might belong to him who is in possession of the Lands on both Sides; tho’ it be open above, as a Gulph, or above and below, as a Streight; provided it is not so great a Part of the Sea, that when compared with the Lands on both Sides, it cannot be supposed to be some Part of them.”

Then we have Vattel. Of course, at that time he had nothing to do with 3-mile limits. Also, it was at that time common knowledge, the whole of Europe admitted it, that what was called the doctrine of the King’s Chambers, was a valid claim on the part of Great Britain. We claimed exclusive jurisdiction over the seas that washed our shores, the four shores that were washed by the ocean. Everybody knew we claimed that, and everybody admitted the claim.

Now then Puffendorf in 1694 puts the claim I think a little clearer even than Grotius. He says:—

“From which Considerations it is manifest that in these times, when Shipping is brought to its highest Perfection, it is presumed, that every Maritime People, at all acquainted with Navigation, are Lords of the sea, where it toucheth their own shore, so far as it may be counted a Defence, especially in Ports and other Places where there is Convenience of Landing. In like manner the Gulphs and Channels, or Arms of the Sea, are, according to the regular Course, supposed to belong to the People with whose Lands they are encompassed.”

And then he goes on to say that if you have the same bay washing the shores of two countries, why then the two countries may divide their jurisdiction, which is really the principle upon which we have given up the Bay of Fundy, because the United States have got one corner of that under their own jurisdiction, so here you have Puffendorf carefully assimilating bays, however large, to the coast of the sea wherever it touches the shore of the country.

That is down to 1694. So that in 1686 France and England were just doing what international law allows them to do. They were not undertaking any unjust act on their own part.

Then Burlamaqui, I think, was put in by Sir Robert Finlay. I need not trouble to go through him. He also distinguishes between bays and the coast of a country generally.

Then Rutherforth. I think Sir Robert Finlay did not put him in. He is in 1754:—

“Since therefore property in the ocean could not be introduced either by occupancy or by division, the necessary consequence is, that it is not capable of being appropriated at all.

“The case of rivers, bays, streights, pools, or lakes is different from that of the ocean. For though, as fluid bodies, they are not set out into

certain and determinate parcels by any marks or limits upon their surface; yet as they are contained within banks or shores, which are near to one another, they are by this means made certain and determinate enough to admit of property by occupancy."

And then, I think to the same effect, you have Hübner.

That is the cannon-shot argument.

JUDGE GRAY: What does that asterisk mean in the first line of section 3, after the word "rivers"—between "rivers" and "bays"?

SIR CHARLES FITZPATRICK: That is the reference to Grotius.

1101 JUDGE GRAY: Oh, I see.

SIR W. ROBSON: I do not know that it carries the matter much farther.

Then there is Vattel, which is already in. Vattel distinguishes between "coasts" and "bays."

I do not wish to repeat passages read by S. Robert Finlay. I just wish to recall that to the minds of the Tribunal. He deals with the question of how far the sea may be appropriated as bordering upon the coast.

"It is not easy to determine to what distance a nation may extend its right over the sea by which it is surrounded. Bodinus pretends, that according to the common right of all maritime nations, the prince's dominion extends even thirty leagues from the coast. But this exact determination can only be founded on a general consent of nations, which it would be difficult to prove, each state may, in this respect, ordain what it shall think best, in relation to what concerns the citizens themselves, or their affairs with the sovereign; but between nation and nation all that can be reasonably said, is, that in general the dominion of the state over the neighbouring sea, extends as far as is necessary for its safety, and it can render it respected, since on the one hand, it can only appropriate to itself a thing that is common, as the sea, so far as it has need of it, for some lawful end (s. 281); and on the other, it would be a vain and ridiculous pretension to claim a right that it was no ways able to cause to be respected."

Of course that puts a very narrow limit upon the coast-line, and it puts a very wide limit upon the "bay." That is why at the very beginning one has to observe that everybody, when you are dealing with the territorial limitations, will notice there is that distinction. It is true it is a component part of the coast, but it is a component part of the coast under different relations. Your 3 miles, the cannon-shot, is enough for the coast-line, but the moment you get into the bay, then the defensibility brings quite new considerations into view, and that is what the United States have omitted when they simply doubled the coast-line limit in order to ascertain what they called the territorial claim; but that is a most illogical way of doing. That is ignoring the bay altogether, ignoring it with all its characteristics, and the facility with which it may be used for purposes of



attack. No international writer does that—none. Every international writer recognises that when he comes to a bay the coast-line limit does not apply. They recognize that now you are coming under fresh military consideration.

Then he goes on in the same way. I need not deal with the cannon-shot idea, because that of course is dealing with the coast-line limit. He says:—

“All we have said of the parts of the sea near the coast may be said more particularly, and with much greater reason, of the roads, bays, and straights, as still more capable of being occupied, and of greater importance to the safety of the country. But I speak of the bays and streights of small extent; and not of those great parts of the sea to which these names are sometimes given, as Hudson’s Bay and the Streights of Magellan.”

And there is no doubt whatever that although we had assumed to take Hudson’s Bay, and kept it, and everybody has recognised our rights, yet still, when you come to deal with some geographical bay—a bay like the Bay of Biscay, for instance, which really washes the shores of two countries—then international lawyers have made a distinction, but they still keep—that is what I am contending for now—they still keep the distinction between bay and open coast. He says:—

“A bay whose entrance may be defended, may be possessed, and rendered subject to the laws of the sovereign, and it is of importance that it should be so, since the country may be much more easily insulted in such a place, than on the coast open to the winds, and the impetuosity of the waves.”

I am trying to answer Dr. Lohman’s question—Did the United States for the first time in 1818 recognise\* that “bays” were to be distinguished from “coast”? I say no. Everybody, both by treaty and by law, had always recognised a distinction up to 1818—always. That is shown by Vattel.

Then there is Galiani, who has already been put in, and I am just going to read him upon this point, because he puts it, I think, as clearly as any of them. I am only going to read two more authorities, Galiani says:—

“Opinions and usages with regard to the extent of this *mare territoriale* have varied however in different centuries.”

This suits my argument well. He says:—

“The safest seems to be that when the coasts do not curve the territory extends out to sea to that full distance reached offensively by balls or bombs from a battery stationed on shore. And 1102 in truth it is in conformity with the principles of common law (jus commune) to call territory that space over which the magistrates and ministers are able through dread of the forces confided to them to execute the orders of their sovereign. I do not find

however any public treatise in which that distance is determined in a fixed manner:”

So that here, Galiani, writing in 1782, the year before the treaty we are construing, does not find that even on the open coast there is anything by which the distance is fixed or determined. There is no 3-mile limit yet.

“and it would be difficult to say whether the jurisdiction over the border of the seas should be rated among the favourable or unfavourable things and therefore be restricted or be enlarged.”

And now he comes to the suggestion of the 3 miles:—

“It seems to me reasonable however that without waiting to see whether in point of fact the sovereign of the territory has constructed such a tower or battery and of what calibre are the cannons he has set up, the distance of three miles from shore should be fixed and given once and for all as that which is surely the greatest that a ball or bomb can be driven with the force of the powder so far discovered.”

Now, we have got the 3 miles. Does that 3 miles apply to the coast of a bay?

Here is what he says:—

“But in places where the land curves and opens into a bay or gulf, it is accepted among the most civilized nations to imagine a line drawn from point to point of that mainland or from the islands which project beyond the promontories of the mainland and to regard as territory all that gulf of the sea, even if the distances from the middle of this to the surrounding coast should be on every side more than three miles.”

Well, now, what does that mean? There you have got in the year—you may almost call it the year of the treaty—because the treaty, though signed in 1783, was really settled in 1782—in the very year of the treaty you have your latest international writer, following all preceding international writers, saying you must not take for your bay the same limit as you take for your coast. He puts it in clearer language than anybody else does. He says: On your straight coast you may take the distance of the strength of your cannon from your shore or your fortress, but the moment the coast begins to curve new considerations apply; and there he is in accord not only with all those who precede him, but those who for many years follow him. New considerations apply; the 3-mile rule will not do. All I have to do is to distinguish between the coast line, with its 3-mile limit, and bays, seeing that they are put in a separate category, and I then get one step further in my answer to the point to which my attention was directed by Dr. Lohman. That is the essential point before we get to 1783, and when we are at 1783. I do not remember that anybody has mentioned the 3-mile limit before. Galiani translates cannon-shot into 3-mile limit, but he says that does not apply to bays, and he



is saying only that which common sense suggests and what international law maintained at that time, and particularly in those places.

Now, the next authority to whom I wish to refer is G. F. von Martens, 1789. I think my learned friend read this, but perhaps I may be forgiven for going over his ground a little here and there. Section 5:—

“A nation may occupy, and extend its dominion, beyond the distance mentioned in the last section ”——

That is beyond the 3 leagues—

“either on rivers, lakes, bays, straits, or the ocean; and such dominion may, if the national security requires it, be maintained by a fleet of armed vessels.”

This, again, I think, is rational and corresponds with the facts of life.

“The empire of a nation on the seas, may extend as far as it has been acknowledged to extend by the consent of other nations, and beyond the boundary of its property. It remains, then, to be considered, whether or not there are such extended limits on the European seas, acknowledged to be the property, or under the dominion, of such or such particular nation. Among the bays, straits, and gulphs there are some which are generally acknowledged to be free; there are others, which are looked upon as under the dominion, and, in part, even the property of the masters of the coast; and there are others, the property and dominion of which are still in dispute.”

1103 I venture to submit that these propositions here laid down by von Martens were probably well understood by the diplomatists of that day. If you want to be acknowledged as the possessor of a bay you must claim it, and you must secure the assent of those who are directly concerned. Nobody cared a button what Great Britain claimed in North America except France, and, perhaps, Spain. It was nothing to the other great Powers of Europe. They had enough on their hands without troubling about British North America. So that, the only Powers concerned acknowledged the territoriality of those bays, and then, when the parties sat down to make the treaty of 1783, they might very well have said: There are authorities, like von Martens, who think that some bays are territorial, and some are not; we will make that quite clear; we will make our treaty apply to all bays—and that is what they did. In order that there might be no dispute as to whether some of the bays were to be treated as territorial, and some were not, they spoke of bays generally. They did not say “all bays” in the treaty of 1783, but they did say “any bay,” which is the same thing as “all bays,” in the treaty of 1818. It says, in the treaty of 1818, “within three miles of any of the bays,” which is the same thing as saying “within three miles of all bays;” so that, in both 1783 and 1818, they use language

which shows that they did not want to have a distinction between one kind of a bay and another. They did not want it to be said that: Some shall be treated as open to the world, and some only as open to us. Why should they? In 1783 it was the interest of America to have all bays under the jurisdiction of a great maritime Power. It was in the interest of America, because America was going to get the right of fishing in them all, and they did not want to have it declared that the bays of British North America were to be treated as international and open. That would only have meant that other Powers might come there; whereas it would suit her purposes better that other Powers might be excluded, because she was going to enjoy a right which only Great Britain at that time in the world could effectually assert; because we had then the greatest navy in the world. One must approach the consideration of this doctrine, remembering that the interest of the United States was to make the word "bays" as inclusive as it could reasonably be construed to be.

There is one other author, and I think he will be the last with which I shall find it necessary to trouble the Tribunal—Azuni, 1806. The translation of this work was published in New York in 1806. Azuni is very explicit and very emphatic. He says:—

"Having established the general principles on which the empire of territorial sea is founded, it remains to define what is meant by the terms, *open sea*, and *inclosed sea*, that we may better ascertain what ought to be comprehended under the denomination of *territorial sea*, and to corroborate the opinion advanced in the next article, as to the extent of this empire. It is certain, and all writers on this subject have agreed, that that must be called an inclosed sea"—

So, I have got down to 1806 now, I have got past my critical date of 1783, and I have a writer of eminence saying that all writers have agreed that that must be called an enclosed sea:—

"—the shores of which, like great gulphs, as well as the mouth, communicating with the high sea, belong to one nation."

In other words he laid down a proposition, which nobody up to this stage—1806—had contested, that, with reference to all these indentations here, the territory is not to be calculated by its sinuous line—that is not what the international writers establish and that is not what any practical nation would be willing to admit—but he says that such a territory is to be calculated so as to include all the seas wherever you have the adjacent land of this formation which belongs to one nation. Some writers go on after 1806, but they are of less importance, because my date is 1783.

Then, I come to 1820, when Joseph Chitty, an English writer belonging to a well-known family of law writers, lays down the same proposition, and that carries me to the treaty of 1818. That is why I go as far as he. Chitty says that all writers seem to admit that



there may be a property in gulfs and even in straits which are open at both ends. He refers to Grotius and then says:—

“After all the admissions that have been made as to the lawfulness of appropriating gulphs and streights, it becomes quite impossible for those who reason on the other side to draw any distinct line even on that part of the subject; for the proportion of the sea to the territory of any nation that borders upon it being made the measure of that nation’s right to acquire an exclusive property in any part of such a sea, this proportion will always be variously  
1104 estimated, according to the interest of the most powerful among the different states concerned in deciding upon the lawfulness of the appropriations.”

That, no doubt, again, is a very sensible reference to the facts of life and of the world. It is not a case of our laying down mathematical rules, because it will depend after all upon what a State can acquire and what a State can defend. Some of them, he states, claim 60 miles out on the sea. But, I have no concern with these extreme applications of the principle; I am only concerned with establishing the distinction. I do not want to direct attention to the question as to how far you might exercise territorial dominion; that is not the object of my argument, because that was so fully dealt with by my learned friend Sir Robert Finlay, and I shall not presume to go over the same ground for exactly the same purpose. I am going over this part of his ground again in order to make good the distinction to which Dr. Lohman has drawn my attention. Is it to be said that before 1818 the United States admitted that bays were not to be treated as open seas? I say that the law shows it and that the treaties which I have read show it—1686, 1713, 1763, 1783.

My learned friend, Mr. Peterson, reminds me that I omitted two of the treaties, one of which is very important. It was the treaty in 1778. I did refer to it, but I did not refer to it in its proper order. In 1778 the United States made an agreement with France which repeated in express terms the treaty of 1686. When I was dealing with the treaty of 1686, the Tribunal will remember that I mentioned that fact, but I ought to have given the treaty itself later on. It is at p. 3 of the British Counter-Case Appendix, and it is very, very important as an express admission by the United States, five years before the treaty of 1783. It is now on the European stage, before the world as an independent power, and it sits down to make an agreement with France as follows:—

“The subjects, inhabitants, merchants, commanders of ships, masters, and mariners of the states, provinces, and dominions of each party respectively shall abstain and forbear to fish in all places possessed or which shall be possessed by the other party;”——

Then follows word for word the language of the precedent—

“the Most Christian King’s subjects shall not fish in the havens, bays, creeks, roads, coasts, or places which the said United States hold or shall hereafter hold; and in like manner the subjects, people, and inhabitants of the said United States shall not fish in the havens, bays, creeks, roads, coasts, or places which the Most Christian King possesses or shall hereafter possess;”

It not only says “havens” and “bays” but it says “havens, bays, creeks, roads, coasts, or places.” They are using the word “coasts” there—I do not mind in which sense, whether it means coasts inclusive of these things, or coasts apart from these things, or coasts as being things which include bays. For my purpose it is the same thing. Whatever extent you give to the word “coasts,” all I want to say is that bays are separately treated from the other factors or component parts of the coast. They are all separately treated for defensive, physical, and economical considerations, for strategic purposes, for revenue purposes, and for fishing purposes.

Another thing that makes an immense difference between a bay and a coast is that there is no need in a bay for the right of innocent passage. You are going down this coast here (indicating the coast of Nova Scotia on map), no one has the right to interrupt you or impede you within your 3-mile limit, but when you go into this bay (indicating Halifax Bay), anybody has the right to ask you what you are doing there. If you are on a voyage from place to place you do not want to be there, you could only want to be in that bay for trade, and in that case we ask you: Why do you not report yourself at the custom-house? Or, if you are not there for trade, you must be there for war and we ask you: What are you doing so close to our territory? The moment you come into that bay as a vessel you put yourself in the position in which you ought to be asked and can be asked what you want, where are you going to, what are you doing? You cannot ask that question of a vessel that only desires innocent passage along the 3-mile limit, and you have no right to ask it at all. You go up to your captain, who is simply going from place to place, and say: You are in my territory, you are in my 3-mile limit; what are you doing here? and he is entitled to say: You have no right to ask it; I am enjoying an international right, and if you tell me I am not, well, my Government will have something to say about that, because you will put yourself outside of the amity of nations; the Government will have something to say about that, and I decline to answer your question. Within the legal territorial jurisdiction the Government have nothing to say to it; they could not complain. But the moment he gets into a bay is he to give the same reply?

1105 According to the United States he is. He is to say: “I decline to answer; I am 3 miles off your coast; I am 3 miles off



any coast." The local authorities would say: "Well, we are very curious about you; you have no right to touch our coast; you are not trading and you say you are not fighting. What have we to do with you?" Is the local authority then to come down and put a cutter or war-ship next him to see what he is doing? No, they have always recognised it in that part of the world as their right to turn him out, and by these treaties of 1686 and 1778 that is what they say they will do. They say: "We will turn out any vessel from our bays as part of our jurisdiction. We won't trouble to ask him any questions; we are not to be put to the necessity of finding out his motives; we will simply say that we have the right to turn him out." That is what is meant by territoriality, and they could not be safe without some such regulation in British North America, because the coast is so indented that if the other nations of the world were admitted it might become a subject of international conflict. The coast is so indented that whereas they might make what laws they liked, and they might lay down what principles they chose, the instinct of self-preservation in British North America would make every Power on that coast close its bays. Do you think that the United States would leave Delaware or Chesapeake Bay open? They never intended to do it and they never will do it. By this treaty of 1778 I have got the assent of the United States to the principle for which I am contending. That is why I told Dr. Lohman that I would show conclusively, not by argument, not by assertion on my part, but by admission on the part of the United States, at a date close upon the treaty—that is of 1783—that they regarded bays as being a part of the coast which must be treated in a totally different way from the rest of the coast. I am not putting, as I am sure will be appreciated, bays as if they did not belong to the coast, as if they were something which is not coast. I am only saying that they are a part of the coast treated differently from the rest of the coast; and when the treaty was made the United States was one of the three Powers which alone were considered in that part of the world, and it had by express admission committed itself to that principle by the treaty of 1778.

Then, I am also reminded that when I was dealing with the treaty of 1763, I ought to have dealt with article 5 on the Gulf of St. Lawrence. In the treaty of 1763, p. 8 of the Appendix to the British Case, it is provided that:—

"The subjects of France shall have the liberty of fishing and drying on a part of the coasts of the Island of Newfoundland, such as it is specified in the XIIIth article of the treaty of Utrecht; which article is renewed and confirmed by the present treaty. . . . And His Britannic Majesty consents to leave to the subjects of the Most Christian King the liberty of fishing in the Gulf of St. Lawrence, on condition that the subjects of France do not exercise the said fishery but at the distance of three leagues from all the coasts belonging to

Great Britain, as well those of the continent as those of the islands situated in the said Gulf of St. Lawrence. And as to what relates to the fishery on the coasts of the island of Cape Breton, out of the said gulf, the subjects of the Most Christian King shall not be permitted to exercise the said fishery but at the distance of 15 leagues from the coasts of the Island of Cape Breton ; ”

In 1763 the United States was not called into existence ; so that again the two material Powers there are treating their maritime jurisdiction as extending to this great Gulf of St. Lawrence and dealing with this immense gulf as if it were territorial. Of course, if they would do that it is an *a fortiori* argument they would do it much more easily and much more naturally with regard to the small gulfs and bays. The Gulf of St. Lawrence is really a great sea. This, in 1778, is what the United States assented to. That is the real treaty after all. It is the treaty of 1778 which is the really important one. The rest are only part of the history. In 1778 the United States steps into this little group of great Powers. This was almost its first great international act, or one of the most important of its early international acts, and it was to secure to these Powers their territorial dominion over bays as against the rest of the world. That was the principle upon which they founded themselves, and that being the principle, all the ambiguities—and I confess they are endless and embarrassing very often—in the letters later on disappear. When they are talking about maritime jurisdiction the maritime jurisdiction that they are referring to is this which I am now describing. I will make that quite clear by one of the letters put in by Mr. Warren. I think he did not quite appreciate its importance from my point of view. He laid great stress on the words “maritime jurisdiction” and he said it meant the 3-mile limit. I will examine, on Monday morning, the letters to which he referred, and I will show that the words “maritime jurisdiction” as used by Lord Castlereagh referred to the maritime jurisdiction in the second half of that

1106 clause of the treaty of 1783. There were two branches of the clause in the treaty of 1783. The first branch related to the common right of fishing in the open seas which we thereby acknowledged to be outside of our jurisdiction. In 1783 we took the very wise and sensible step of limiting our claims to this great maritime jurisdiction. We put the banks and the high seas outside and we said to America : “We acknowledge your right ; we do not affect to give you a liberty over this part of the sea ; all this that we have claimed as our territory we treat as being subject to a common right on the part, at all events, of the nations concerned in British North America.” But it goes on to say that in regard to what we regard as our maritime jurisdiction we give you certain liberties. What are they ? They are defined in the treaty itself—coasts, bays, and creeks. There



we give you a liberty, and that expression is the one referred to by Lord Castlereagh when beginning his negotiation in 1814 for the treaty of 1818.

SIR CHARLES FITZPATRICK: The preposition "on" in article 3 of the treaty of 1783, of course, applies to bays and creeks as it does to coasts, grammatically construed?

SIR W. ROBSON: Yes.

SIR CHARLES FITZPATRICK: So that it should be read "and also on the coasts, on the bays, and on the creeks."

SIR W. ROBSON: I think the word "on" means "in" there.

SIR CHARLES FITZPATRICK: And in article 1 of the treaty of 1818 adopting that principle there in connection with the renunciatory clause you would say: "or within 3 marine miles of any of the coasts, or within 3 marine miles of any of the bays, creeks, or harbours." It has to be repeated again grammatically construed?

SIR W. ROBSON: Yes, that is so. Of course, it makes it quite clear to say "within three marine miles of any of the bays, or within three marine miles of any of the creeks," and so on.

SIR CHARLES FITZPATRICK: So that it is not necessary from the standpoint of grammatical construction to repeat the word "on"?

SIR W. ROBSON: I am obliged, Sir Charles, for the reminder. The point I was going to make was this that Lord Castlereagh—I will read the letters on Monday—takes up this question. At the Treaty of Ghent they unfortunately had been unable to settle it, and therefore they left it open for further negotiation. When they begin to negotiate preliminary to the treaty of 1818, Lord Castlereagh draws attention to the two parts of the third article of the treaty of 1783, the first part relating to the right which was concerning the high seas, and the second part relating to our maritime jurisdiction. Now, then, when you turn to the second part, you see that this liberty is covered by the phrase "maritime jurisdiction." It is not merely coasts but bays. They are both covered. Although bays be a geographical part of the coasts, yet they are specially mentioned so that there will be no doubt about it. And yet, Mr. Warren went gaily on as if "maritime jurisdiction" referred only to the 3-mile limit.

DR. DE SAVORNIN LOHMAN: The intention of the question which I put was not to ask if there was a distinction between "bays" and "coasts" in the juridical sense, but it cannot be denied that the Americans had the right to fish on the shores of the bays by the treaty of 1783. That was a fact, was it not?

SIR W. ROBSON: Yes.

DR. DE SAVORNIN LOHMAN: That right existed until the war, and after the war the Americans maintained that they still had the right to fish on the shores, and also on the shores of the bays, but it was

not acknowledged by the British. At the end of the negotiations they said: We will draw a line 3 miles from the shore, and we shall have the right to fish only without that 3-mile limit. Now the question I intended to put is not if the Americans distinguished coasts and bays in the judicial sense of the words—nobody denies that—but if they did not have *facto* the right to fish within 3 miles of all the shores. They often used the term “shores.” What did they  
1107 intend to renunciate? That they formerly had the right to fish on the shores of the bays is not to be denied. Now, I ask whether it is probable that they not only renounce the right to fish within the 3 miles, but also the right of fishing in the whole bay? Was it their intention to abandon the entire bays? And if not, I ask whether the renunciation clause of the treaty can be read in the same manner as the corresponding sentence in the treaty of 1783, that is to say, that the four words used were only intended to describe the word “coast.” In the treaty of 1783 they employed three words, in the treaty of 1818 four words, to express the same thing—the entire coast. I am a Dutchman, speaking in a language which is not my own, but notwithstanding I hope to have succeeded in making my meaning clear.

SIR W. ROBSON: I understand perfectly well, Dr. Lohman, and I am very much obliged for the question because it is a most important question. My submission is that in 1783 they used “coasts” and “bays” meaning to give the Americans the right to fish in all. As you have said, they were entitled to come into every bay and fish within the 3 miles. In that case the word “bays” added very little to the effect of “coasts,” but it was necessary because, if the treaty had said “coasts” alone, the question might afterwards be raised as to whether it meant “bays,” because “bays” had always been, in other treaties, specially mentioned when it was desired to give permission to enter them. However, there was no difficulty in 1783, because they had the right to go everywhere. Now, in 1818 the word “bays” again enters into the treaty and the Americans renounce “bays.” They are only renouncing in 1818 that which they got in 1783. In 1783 they had got the right to fish along the coast, including the coast of the bays. In 1818 that is the right they gave up. They are not giving up any more in 1818 than they got in 1783. What they got is just what they renounced, that and no more. They got it as being part of the jurisdiction of England, because the maritime jurisdiction of England extended not merely over the open coast and the coast of the bays, but it extended over the water of the bays, and they got the right to fish in that water. Having got the right from England in 1783 to fish in the water of the bays, when 1818 comes, England says: “Now, we will make you give up that right which we gave you; we will make you renounce it,” because it was



not, as has been said, a voluntary renunciation on the part of the United States. I shall show letters which indicate that England demanded the renunciation and got it. England said: "We will now make you renounce that which we gave you in 1783. We gave you the right to fish on the open coast and we gave you the embayed waters. We gave you the right to fish inside of the bays more than 3 miles from the coast, and we are now going to take that right back. The right to go inside of those bays you shall not have." They are not using the word "bays" there as a superfluous or unnecessary word; they are using the word "bays" as being something quite different from the rest of the coast because, as you remember, when you look at the proviso, the proviso says that you shall not enter the bays. They are not handed back to the open sea; they are still kept closed against you and you shall not enter them for the purpose of fishing.

DR. DE SAVORNIN LOHMAN: I may only remark that it was not Great Britain that said: "We will not give them to you," but it was the Americans who said: "We will renounce them."

SIR W. ROBSON: That is a question. It has come to be treated as one of the accepted facts of the case, but I think I shall show that it is not accurate. It has come to be accepted as one of the facts of the case, because it has been so often asserted. It is not a fact that the Americans insisted on the renunciation. I had better keep that until Monday morning, and I will read the passages which show clearly that England demanded the renunciation, that Mr. Monroe did not like it, but that afterwards they renounced their right. The American negotiators write home and try to justify their sagacity by saying: "See, we have actually insisted upon renouncing these bays; we have insisted upon renouncing them because we have done an extremely ingenious thing in getting the right to fish up to 3 miles." That was not an accurate statement of the matter, as some other statements made in the same report were not accurate. That has not been dealt with yet, and I have given a little attention to that part of the case because I thought it was very singular that anyone should  
insist upon giving something up. I have never yet known  
1108 nations to insist upon renouncing anything, and I think it will  
be found in this case that they are like other nations and keep  
all they can get.

THE PRESIDENT: The Court will adjourn until Monday at 10 o'clock.

[Thereupon at 4.10 o'clock p. m., the Tribunal adjourned until Monday, the 1st August, 1910, at 10 o'clock a. m.]

THIRTY-THIRD DAY, MONDAY, AUGUST 1, 1910.

The Tribunal met at 10 a. m.

THE PRESIDENT: Will you please continue, Sir William?

THE ATTORNEY-GENERAL, SIR WILLIAM ROBSON (resuming): I propose, Mr. President and gentlemen, this morning, slightly to deviate from the scheme of argument that I had laid down for myself on Friday afternoon. I was proceeding then to compare the contentions of Great Britain and the United States in respect to "bays." I had pointed out what those contentions were, and I may shortly recapitulate them, so that I may come clearly to the point of my argument to-day.

On the one hand we have Great Britain contending that the United States has renounced all rights for its inhabitants to fish in the bays of His Majesty's dominions, and we say that they thereby renounced all right of fishery in "bays," using that word according to its ordinary geographical sense; that they thereby admit that which, according to us, was the undoubted and admitted fact long before the treaty, viz., that we possessed over these bays a territorial jurisdiction which comprised the right to exclude anyone from those bays, and from fishing therein, precisely as we could exclude anyone from entering our land territory.

The United States, on the other hand, said that the word "bays" was not to be construed in that general sense, but that it was to be construed with reference to territorial dominion, and construing it in that sense, only the smaller bays were comprised within the renunciation.

The United States did not treat the word "bays" so as to deprive it of all significance, but so as to limit its significance.

They said the word "bays" was put in there in order to indicate the indentations of the coast which were to be treated as part of the dominion of England, but they were only the small indentations of the coast.

Now, there is suggested to me a difficulty which I think I ought to deal with at once, namely, not whether the "bays" meant small bays as opposed to large bays, or territorial bays as opposed to geographical bays, but whether the word "bays" really had any effective meaning whatever.

That of course is a point which I think I ought to take first, and I am very grateful indeed to the Tribunal for putting it before me, so that I may deal with it at once. Before I ask what was the exact scope of the word "bays," I think I am entitled to assume that the word is not used there superfluously. The presumption is that it was put there with some definite meaning and intent.



Of course the United States did at one time take up the contention that the word was there unnecessarily, that there was no occasion for it, that it was there merely as descriptive of parts of coast, but not as having any special significance, not as filling or performing any special vocation, just put, as lawyers do sometimes put words descriptively, rather than in view of their having any particular or important meaning. That was the position at one time that the United States took up, but they abandoned that. They took it up as far back as 1845, when Mr. Everett, I think, put it forward, and then, in answer to a letter from Lord Aberdeen (I am not going into the references now, because you are quite familiar with them), Mr. Everett abandoned the contention that "bays" meant nothing, and he admitted that, after all, the 3-mile line must be drawn around the coast in a way which should enable the nation owning the adjacent territory to claim its own bays, irrespective of the precise measurement between the headlands. The same contention that bays  
1109 meant nothing came up again in the United States Case, but always, whenever the United States has adopted that view, it has found the difficulty of maintaining it rather greater than it anticipated and has abandoned it. And now the United States in their Argument have put forward the contention that the word "bays" did mean something. That it meant a particular kind of bay. They are not very clear yet exactly as to what meaning they will finally adopt, because we had in the course of this argument, in this room, a little wavering between two quite distinct views of the word "bays."

On the one hand, we have Great Britain coming here thinking that the United States were going to contend on their argument, on their printed Argument, that a "bay" or "bays" of the kind that were renounced meant "bays" 6 miles or less at their entrance, no matter what their interior dimensions might be.

Then Mr. Warren had difficulties about that view, which he thought perhaps were not easily met, and so he developed in his speech a theory of "bays" which was not in the correspondence, not in the written Counter-Case or Argument, but which was, according to him, that you followed the indentations of the coast until coming along those indentations where they narrowed you came to a point where you could get 6 miles across, and that you made a bay—a bay within a bay.

Well, now, all those contentions of the United States for the moment I lay aside; they are not the suggestion with which I am about to deal. The suggestion with which I am about to deal is that the word "bay" is superfluous, that it has no meaning of any value in this controversy at all, that all that was meant when you speak of "coasts" and "bays" is "coasts." You follow the line of coast

according to this suggestion; if you are in an indentation, if you are in a curve, still you follow the line of the coast, and you give to the adjacent territory 3 miles from that line, wherever you are, whether you are in a curve or in the open coast.

Now, the effect of that is to delete or remove the word "bays" altogether, and though of course it is a point very well worthy of consideration, yet the point is one which has the general presumption against it. At present I say no more than that.

One assumes that if a word is used it is there for some purpose material to the intention of the parties. You assume that. It is not always the case, as every lawyer knows. The verbosity of the law is one of its weaknesses. Very often persons try the very worst of all means to get at lucidity, namely, the multiplication of words, so that you may perfectly well have words which are not really effective; and—may I make this observation?—it is more common to find these superfluous words in documents written by lawyers than it is to find them in documents written by men of business. I need not say that I speak with the greatest respect of the profession of which I am a humble, but now beginning to be a somewhat aged, member; but, still, a man of business sitting down to write a letter or make a contract is much more likely to use too few words than to use too many. And here you have a document prepared by careful and experienced laymen. The chances are—for the moment I say no more—the chances are that every word which found its way into that document was a word to which somebody attached importance.

Well, now, how shall I best show the Tribunal that the words "bays, creeks, harbours and inlets" were used with a serious and practical intent?

They appear at a very early stage in the negotiations.

At the time at which I shall proceed to deal with them, which will be when the negotiations for the treaty of peace were considered, the position of the parties was of course that there would be no occasion among them to differentiate between "coast" and "bay." When the United States were asking for the right of fishery they were asking, as Dr. Lohman very well pointed out to me, for the right of fishery as a whole. When they wanted to fish on our coasts they wanted to fish in our bays as part of our coasts. There was no occasion whatever for them to differentiate there between "coast" and "bay"—none. And, at that point, I am in accord with the suggestion made to me by the Tribunal, namely, that when the words come into controversy they are being used in a very general sense, and with little important meaning so far as the distinction between "bay" and "coast" is concerned. Why were both words used when the one word "coast" would have sufficed? This is rather a useful enquiry. When the United States Continental Congress were asking



for the right of fishery—and when I say asking for it, I mean considering it with a view to demanding it—why did they not simply say “coast”? When they are talking about the inshore fisheries they begin by saying they want to fish in “coasts, bays, creeks and harbours.” Why do they trouble to say anything about coast, bays, creeks, and harbours? Well, there was this reason, if they had said “inshore fisheries,” I dare say that might have served their  
 1110 purpose. But they were accustomed to have bays separately treated. The statesmen who were making these demands, and who ultimately signed this treaty, had always treated a bay as a part of the coast requiring special consideration and attention, and therefore, although there may not have been any special need to enumerate them in 1779, they did it; it may be partly from habit, partly from caution.

Now, it was the United States Congress that did it. There is the first good instance—there are many, and I am not going to take them all—but the first good instance (British Counter-Case Appendix, p. 12) is in 1779, when Congress is considering the point, and they say in paragraph 3, under the heading “1779,” where they are putting forward their demand for bays:—

“That a common right in these States to fish on the coasts, bays and banks of Nova Scotia, banks of Newfoundland, and gulph of St. Lawrence, coast of Labrador and streights of Belleisle, be acknowledged,”

And then it goes on at the latter part:—

“That in case Great Britain should not be prevailed upon either to cede or declare Nova Scotia independent, the privilege of curing fish on the shores and in the harbours of Nova Scotia be required.”

Now, that paragraph, as I say, is a very good illustration of what I have just referred to as common ground between myself and those who make the suggestion that bays and creeks are somewhat unnecessarily used at this stage of the proceeding.

If the United States Congress had thought that the word “coast” was quite inclusive of everything it wanted in regard to bays, it would probably have contented itself with the word “coast.” Now it did not.

Those resolutions are not hastily drafted. This resolution of Congress is one that would be carefully considered. Although they had been fighting for about five years at that time a heroic and exhausting struggle, they were anxious for peace, and though they were anxious to get all they could, yet they would be very careful not to ask terms that would make peace difficult. And so they had very carefully considered this clause, and the language they are using first of all is, “coasts, bays and banks.” Now, what an extraordinary

classification that is. What does it mean? Let us see exactly what is in the mind of the person that uses it. "Coasts" we all know. It is a term which may be used in its widest sense and might include a great deal. It could not include "banks." So they ask, first of all, for fishing round all these "coasts." They then ask for fishing quite separately in these "bays;" and then they ask for fishing quite separately on these "banks."

So that one can see in their minds quite clearly, by their phraseology, there are three things about which they are particular. The "coast," which I do not deny, at all events for the moment, may be used in a sense which covers "bays," but they are not content to let "bays" depend on "coasts." So they then say "bays," and after that they say "banks."

Now, those are the three categories of fishing that come into the minds of the negotiators when they are called upon to say what they want. They say: We want those three kinds of locality for fishing.

Then, later on, they come to "Banks of Newfoundland," "Gulf of St. Lawrence," and "coast of Labrador."

Now here again let us look into their minds, as far as we can, remembering they were men of business.

Labrador at that time they did not know much about. They did not apparently know then what appears a few years later, that the "bays" of Labrador were of so much importance. Later on, when I come to discuss the projets and counter-projets of 1818, it will be seen they had then learned to appreciate the importance of the "bays" of Labrador.

According to Mr. Sabine, it was towards the very end of the eighteenth century that anybody ever visited Labrador. And they found out then that the cod, which did not trouble the bays of Newfoundland, did affect the bays of Labrador. But at this time they are only thinking about the "coast" as being one of the coasts they see on the map. So that all they say is "coast." It is a curious distinction to begin with, between "coast" and "bay," but I am not laying any very great stress upon it at this period. I am not concerned to deny that they might there have used the word "coast" as meaning "bays" also; it does not trouble my argument in the least, because it

will be found that up to a certain point I am trying to walk  
 1111 in step with the suggestion that the word "bays" was very often thrown in in a general sort of way as part of the "coast," without troubling very much as to its separate importance.

Then it goes on about "shores and harbours of Nova Scotia." Now, that means "shores" only, because it is "drying and curing fish." But it may mean, and I think does mean, "shores of bays." I may be wrong, but anyhow I am quite content to take it so for the present purpose.



Now, this is the short statement of my argument upon that paragraph: The United States Commissioners adopt phraseology which shows that they wanted the whole of the fishery. They proceed to enumerate its parts, and in enumerating its parts they are not content to let "bays" be included in the word "coast." They have, in dealing with Nova Scotia, dealt only with "shores." They are thinking only of shores, because they are referring only to "curing fish." They are not thinking about the fishery in the bays.

Well, now, that phraseology is carried on for the same reason through several instances. At the bottom of p. 12 there is a rather curious note:—

"On folio 493 is a paper in the writing of John Jay, which appears to be the first form of this paragraph. The differences are:—For 'common right' read 'equal right'; for 'coasts, bays and banks of' read 'coasts of,' and for 'continued unless' &c. read 'continued, unless our Allies shall absolutely refuse and threaten to make a separate peace.'"

Now, I read that note, not for founding any very special argument upon it, but to show how carefully they are considering these words. They are not using the words "bays, banks, creeks and harbours," &c., without reflecting as to whether they have any meaning or not.

Mr. Jay thinks he had better not put these words in; somebody else says "we had better have them," and so the words "bays and banks" are put in. I cannot read their minds. We know what they said and what they did, but I cannot conjecture the precise argument that Mr. Jay may have addressed to the other negotiators or they to him. All I can say is that these words are not put in with a mere running pen. Clever men, earnest men, men acting under the stress of the greatest national need, having to be careful of every step they took and of every word they used—these men were setting down this very paragraph and weighing every word.

JUDGE GRAY: Is folio 493 containing that note in this record anywhere?

SIR W. ROBSON: I have not seen it; in fact, I very recently noticed this. It was useful to my argument, but I really had not noticed it before. That is the sole observation I found upon it. Well, now, to come to some other instances, just following the same book, p. 29, where the word—

THE PRESIDENT: Might there not be an explanation concerning the circumstance that the bays of Nova Scotia are mentioned specially, whereas, with reference to Labrador, they speak only of the coast? If one looks at the map at some distance, or if one looks at a map on a small scale, there appears a striking difference between the bays of Nova Scotia and the bays of Labrador. The bays of Nova Scotia present themselves to the eye, at first glance, as separate entities, as

very large bays, whereas the bays of Labrador appear to be small bays. Might not that have been the reason that they mentioned the bays of Nova Scotia as separate entities, whereas they considered the bays of Labrador only as parts of the coast?

SIR W. ROBSON: I think that might very well be the reason, Sir. Of course, that accords with my argument. It may have occurred in accordance with the suggestion of the learned President. Somebody may have said: "Really, what are bays and banks of Nova Scotia; do they need special mention? We are not mentioning them in the case of Labrador; we are not mentioning them lower down when we are dealing with drying and curing; why mention them?" That may have been the reason, and then somebody else says: "We had better mention them." Another says: "Well that may be using a lot of words for no good purpose;" and someone else says: "No, we must put them in here; Nova Scotia is rather important; we do not much mind about Labrador whether we get the bays or not, but we must not have any doubt about Nova Scotia; put them in." My reasoning, there, I submit, is unanswerable at this distance of time when you cannot call the parties before you. I am not saying what their motives were; I am only saying that their motives were such as to show that they considered these very words; that they were not running, as a lawyer's clerk does a conveyance, very often putting in a whole host of words to make sure that he gets in everything, 1112 whereas, unknown to himself, he very often leaves out the most important thing and does more harm than if he had used more simple phraseology.

THE PRESIDENT: Is this note on folio 493 taken from the American edition of the Proceedings of Congress?

SIR W. ROBSON: I suppose it will be. Folio 493 must relate, of course, to the Proceedings of Congress. This note is taken from the American reprint of the Proceedings of Congress.

THE PRESIDENT: It is not an addition to this Counter-Case?

SIR W. ROBSON: No, it is part of the original document.

JUDGE GRAY: Of the document from which these paragraphs 1, 2, and 3 were taken?

SIR W. ROBSON: Yes, Sir; that is to say, that the whole of p. 12 is a copy, with the omission of the immaterial passages, of that which appears in the Proceedings of Congress. We have sent for the book. I have not seen it myself, but I have no doubt it will show that. Now, to come to pp. 28 and 29 of the British Counter-Case Appendix, we there find another useful instance of the use of the word "shore." It begins at the bottom of p. 28, and it is an extract from a report of a Committee of Congress dealing with the fisheries. It says:—

"Another claim is the common right of the United States to take fish in the North American seas, and particularly on the banks of



Newfoundland. With respect to this object, the said ministers are instructed to consider and contend for it, as described in the instructions relative to a treaty of commerce, given to John Adams on the twenty-ninth of September, 1779, as equally desired and expected by Congress"—

And so on.

In the next sentence they say:—

"They are also instructed to observe to his most christian majesty with respect to this claim, that it does not extend to any parts of the sea lying within three leagues of the shores held by Great Britain or any other nation."

I might explain—I have no doubt the Tribunal is familiar with it—that in arranging terms of peace to be put forward by themselves and France, they wanted to let France see that the terms that the Americans were demanding were not extreme and that therefore the French might very well assent to them. They said:—

"They are also instructed to observe to his most christian majesty with respect to this claim, that it does not extend to any parts of the sea lying within three leagues of the shores held by Great Britain or any other nation. That under this limitation it is conceived by Congress, a common right of taking fish cannot be denied to them without a manifest violation of the freedom of the seas, as established by the law of nations, and the dictates of reason; according to both which the use of the sea, except such parts thereof as lie in the vicinity of the shore, and are deemed appurtenant thereto, is common to all nations,"

There, it is the use of the word "shore" and the words "vicinity of the shore." We are in the year 1782 and there is no such thing then, as I have pointed out before, as a 3-mile limit. They are trying to enlarge the territorial jurisdiction, not for the sake of the fisheries so much as for the sake of keeping Great Britain with its navy out of their territorial waters; and they put it at 3 leagues—9 miles. They talk of the "vicinity of the shore," and it might very well be asked at this point: "What does 'shore' mean?" It does not mean open shore; it means the shore all the way round the coast following the indentations. That is a fair instance of the use of the word "shore" in a way which renders immaterial the distinction between "coast" and "bay." It seems to me one of the strongest instances that I have to deal with. Of course, if it really meant that there was to be no maritime jurisdiction in any nation except that which attaches to its shore line, that would be a very important point against me because it would ignore bays altogether. But did it mean that? It would be curiously inconsistent with the result of the proceedings of Congress in 1779 if it meant that. In 1779 they were wanting the fishery, and so they said: "We must be entitled to go into the bays to get it." In 1782 they are trying to get the King of France to co-operate with

1113 them towards putting forward terms of peace, and they want to get the 9-mile coast-line limit. They do not say anything about bays, but did that mean at that time that they did not want bays? Here again we must turn to their journal of Congress and it is on p. 166. It is curious how little definiteness there is there even in their coast-line. At p. 164, I observe, is the report of the committee that, the Tribunal will remember, we discussed, as to whether it was ever acted on or not. Perhaps the Tribunal will remember that there was a report presented to Congress on the 22nd January, 1782, that it was then referred to another committee and that that committee reported that it should be referred to the Secretary for Foreign Affairs to be by him digested, completed, and transmitted to the ministers plenipotentiary. So that, it is digested and completed and is sent to the ministers plenipotentiary for their instruction and guidance in August 1782. I will read the whole paragraph:—

“Thus it appears, upon strict principles of natural law,”—

They are discussing these very questions of property to the fisheries and territorial jurisdiction—

“the sea is unsusceptible of appropriation; that a species of conventional law has annexed a reasonable district of it to the coast which borders on it; and that in many of the treaties to which Great Britain has acceded, no distance has been assumed for this purpose beyond fourteen miles.”

They have got in their heads their coast-line limit—I do not care whether it is 3, 9, or 14 miles, or any other figure—but they clearly have in their minds that there is a distance of water which ought to be appropriated to the coast all the way round. Does that mean that they must follow the coast-line of the bays, or that they take the bays on a different footing altogether, on a separate principle, to the water which they take off the open coast? You will find that dealt with on the next page. It says:—

“But the sea cannot be holden or possessed, these terms implying appropriations. They accord well with havens, bays, creeks, roads or coasts;”

You may possess them. They agree that you may possess havens, bays, creeks, roads, or coasts even though they are part of the sea. It is a right to possess them separately and by a title quite independent of the principle on which you possess the 14 miles, or 3 miles, or 9 miles of sea attached to the coast. They thus indicate by their own resolutions that when you are to fix the limit alongside the shore, that does not mean that you are going to give up the bays which are treated as separate. You keep them. They are susceptible of appropriation and the word “appropriation” is proper therefore to them. So that the use of the word “shore,” at p. 29, where



they are only discussing the extent of the territorial jurisdiction, which they attach as the coast-line limit, does not mean that bays are to be ignored. It means that bays are on a separate footing altogether. In this particular document they are not thinking about bays. The thing they are discussing is the general coast-line. The general coast-line is one thing and a bay is another. The inferences which I draw from these documents may appear here and there to be strained because they require so much exposition, but later on, as I am dealing with them chronologically, what appears to be only a matter of inference or argument, will come out in the clearest terms by their explicit statements when I come to the later and absolutely conclusive documents.

There are other instances of the same kind; I might enumerate them. On p. 96 of the British Counter-Case Appendix, Mr. Townshend makes proposals, and I think I might take this as a very good instance of what I might call this offhand use of the words "shore" and "bays."

"Art. 3d. The citizens of the United States shall have the liberty of taking fish of every kind on all the banks of Newfoundland, and also in the Gulf of St. Lawrence, and also to dry and cure their fish on the shores of the Isle of Sables, and on the shores of any of the unsettled bays, harbours, and creeks of the Magdalen Islands in the Gulf of St. Lawrence, so long as such bays, harbours and creeks shall continue and remain unsettled. On condition that the citizens of the said United States do not exercise the said fishery, but at the distance of Three leagues from all the coasts belonging to Great Britain,"

There you see again you may come into the bays and use the bays and the shores of the bays, but you may not fish within 3 leagues from the coasts; that is the general coast-line which is inclusive of bays.

1114 At this time—and here let me make it clear at once because it leads up to a very useful distinction—the really dominant thing in the minds of the negotiating parties is the word "coast." The bay is a component part of the coast but they are asking for the coast inclusive of the bay, and although the word "bay" is put in, and I say by habit and for caution, yet they are thinking, as I think Dr. Lohman pointed out in the questions that he put to me, mainly of the coast. Later on a time comes when they are thinking of the bay and less of the coast. In 1782 they are asking for the whole fishery along all the coast; whether it be open coast or the indented coast they want it all, and therefore "coast" is the word that is most important and that is the thing upon which they are laying stress. Afterwards, when, instead of inclusion, exclusion is being considered, when England turns round and says: The coast is one thing; but you shall not have the bay, then the word "bay" begins to be an important consideration, but up to this stage where they are asking for everything

inclusive of bays, of course, the word "coast" and the word "shore" are frequently used as being sufficient. They know that they are getting the whole fishery and they might quite easily say, as they did say in some of these cases, that the word "coast," or "shore" is inclusive of bays. They did not always do it because when they were spoken about they ran in the words "bays" and "creeks" out of habit, but sometimes they did. They did it, as I say, because nobody at that time wanted to exclude the bays, nobody was trying to withdraw them. These words are practically all one; it is not a question between coasts and bays. They want the fishery, the whole fishery, both on the coasts and in the bays, and everybody knows that is what is being asked for. I need not give other instances. I think I have given enough just to illustrate the use of the words, but there are other instances.

I may come now to the preliminary articles of the treaty itself and here one must lay stress upon the formal document. It is very easy to fall into the mistake of treating these private documents of the negotiators as though they had the same force as the formal document in which both of the parties set down and committed their intention to definite writing. When they are writing to each other, when Mr. Townshend is writing to Mr. Strachey, or when Mr. Adams is writing to Mr. Monroe, or when Mr. Rush is writing to Mr. Gallatin, they do not write as if their letters were going to be interpreted and criticised like contracts. They write for short; sometimes they say: "coasts, bays and creeks," and sometimes they say only "shores." But now we are coming to the document, the contract, the preliminary articles of the treaty in 1782 and then there they are using their words very carefully. At p. 108 of the British Counter-Case Appendix, we again get signs of the curious care with which they are using these words, because they say that:—

"the United States shall continue to enjoy unmolested the right to take fish of every kind on the Grand Bank . . . also in the Gulf of St. Lawrence, . . . also that the inhabitants of the United States shall have liberty to take fish of every kind on such part of the coast of Newfoundland, as British fishermen shall use, (but not to dry or cure the same on that island), and also on the coasts, bays, and creeks of all other of His Britannic Majesty's dominions"

I confess that I cannot as a lawyer suppose that these words "bays and creeks" were thrown in there as merely following the instinct of legal rhythm, as merely running words, or because they often used them together. They must have thought them out. They only say "coast of Newfoundland." Why is that? At that time—1782—Great Britain was fighting both the United States and France. France had rights on the coast of Newfoundland. We did not know how we might have to deal with those rights. Remember, these are



agreed terms; it is not a mere draft. It was a little difficult for the negotiators for Great Britain quite to know what position they would be in with regard to the French fishing rights in Newfoundland. Of course, I have no doubt that we would have tried to have got rid of them. On the other hand, we would know how insistent France was at that time about having them as a nursery for her fishermen and we would suppose, therefore, that we could scarcely get rid of them. We were not unwilling, I dare say, to let the United States have the same rights as France had, or concurrent rights with ourselves, or to have some rights upon the coast of Newfoundland, but we could not be quite sure whether ultimately the rights of the French might not make it impossible for us to make good our grant that we were giving to the United States; so that we were putting it in somewhat cautious form, and you may depend upon it that these words were carefully considered. We say only "coast of Newfoundland"; we do not say "bays and creeks," and we only say "such parts of the coast as British fishermen shall use." Why do we say only the coast? I

1115 think again here the reason is pretty obvious. The British negotiators would say: It is a very serious thing to allow the French and American fishermen to be fighting in our jurisdiction. As long as they are merely fishing off the coast they are not quarrelling with each other, there is room for them all, and they will probably have the sense to keep their nets out of each other's way. But, if we let them into the bays, there, there is less space for them, there are particular places in the bays which are better for fishing than other places, and there are shores of the bays where the men get off to dry their nets, and if once you let the fishermen into the bays you cannot keep them off the shores. Therefore, we had better not say anything about the bays of Newfoundland. Of course, this is an argument which would arise better on Question 6.

DR. DE SAVORNIN LOHMAN: May I ask you a question, Sir. William? Your contention is that the word "coast," of which you are now speaking, did not include the bays?

SIR W. ROBSON: Yes.

DR. DE SAVORNIN LOHMAN: They say:—

"but not to dry or cure the same on that island."

Drying and curing only take place in the bays?

SIR W. ROBSON: Yes.

DR. DE SAVORNIN LOHMAN: If drying and curing are confined to the bays, would not the use of the word "coast" in that connection also imply bays, because otherwise they would not have to make this exception for drying and curing?

SIR W. ROBSON: I rather read it the other way. I read it as though they said: We will give you the liberty to take fish on such

part of the coast as British fishermen use. Having said that we give you the liberty to take fish, they said: But, we will not allow you to dry or cure, which means the same thing as saying: We will not allow you into the bays, because really you have to get into the bays in order to dry and cure. Perhaps I am getting a little beyond my immediate purpose because I do not care really whether "coast" includes bays or not for the purpose of Question 5. When I come to Question 6 I think I shall be able to make a very good case, in so far as the construction of the treaty is concerned, that when we gave the right to fish on the coast that did not mean bays. My difficulty about Question 6—and I might just as well be frank, because, when you know you cannot help being found out, candour is advisable—is the subsequent conduct of Great Britain, her conduct at Halifax, her conduct in various other ways. That is my difficulty about Question No. 6; my difficulty is not on the construction of the treaty. I think that on a strict construction of the treaty the balance of the argument is strongly in favour of my case on Question No. 6; that is that they are saying, in words which are as plain as practical men could use to a fisherman: You may fish on that coast, but you may not dry or cure. What does it mean? You may fish on the coast, but you must not do what is only done in the bays, because nobody dries or cures on the open coast. You may not do what is only done in the bays, you may not dry or cure, which is another way of saying: You may fish on the coast, but you shall not go into the bays.

But, I am here being tormented before my time; because this will all arise on Question 6, and for my present purpose I would rather treat it separately. I would rather keep Question 6 out of the road, but if it is necessary for the purposes of my argument, I am quite prepared, hypothetically—not, of course, as a fact, but I am prepared by way of hypothesis—to take this point against me in so far as Question 6 is concerned, and just argue it alone.

THE PRESIDENT: Is not some stress to be laid on the words that: "the United States shall have liberty to take fish of every kind on such part of the coast of Newfoundland, as British fishermen shall use,"

If British fishermen go into the bays then it is clear that American fishermen may also go into such bays on the coast of Newfoundland, as the bays are part of the coast of Newfoundland into which British fishermen go?

SIR W. ROBSON: Yes, I am not disposed to contest that at all.

THE PRESIDENT: Then there would be the consequence that bays are included also with reference to Newfoundland without being mentioned specially because they are included in the formula  
 1116 "such part of the coast of Newfoundland as British fishermen shall use"?



SIR W. ROBSON: Yes.

THE PRESIDENT: That rather ambiguous formula was probably adopted because they did not quite know what were the rights of the French. If the rights of the French were exclusive, then British fishermen might not go to that part of the coast, and American fishermen also could not go.

SIR W. ROBSON: If, in fact, the British fishermen used the bays.

THE PRESIDENT: Yes.

SIR W. ROBSON: I do not think they did. However, I take all that against me, because I want to make good my point on Question 5. So, whether I am right or wrong on that later question, I will keep my difficulties in reserve until I come to that point, and I will assume that here, in dealing with Question 5, the answer is against me on Question 6, so as to keep my argument untrammelled as far as possible, and to be able to present it in a clear form.

I read this, therefore, taking "coast" as meaning, say, "bays" there, and then, going on to "coasts, bays, and creeks of His Britannic Majesty's dominions." I want to pause for a moment on those words, because those are the words that I have to deal with on Question 5: "Coasts, bays, and creeks." On the assumption on which I am now arguing, the word "coast" in the antecedent sentence included "bays." Why, then, in this sentence which immediately follows, in the very next line, does not the word "coast" include bays? It does not. The negotiators will not allow "coasts" to include "bays." Geographically—I am still keeping to the assumption I said I would—geographically, "coasts" includes "bays." Why, then, were the negotiators not content with the known geographic use of the word? There was a very good reason. Coast, for the purposes of territory or fishing, implied a certain maritime belt of water, which nowadays is put at 3 miles, and then was put at varying figures. A bay meant more than that. For instance, take the then maritime limits, say at 9 miles, then you could have bays and did have bays more than 20 miles across; so that the coast line carried round the bay would leave a portion of the middle of the bay open water. Everyone knew that. Everybody knew that a coast-line carried round the bay—what Mr. Ewart called the "fisherman's theory"—which, as I have said, the United States once held and put forward and then abandoned—left in the middle of the bay a certain amount of open water, which would not be regarded as territorial if the coast-line were followed. So that foreign fishermen would get admission to the bay although they could not and would not have any right to get to the shore of the bay. They would have no right to land. That gave a very imperfect protection to the fishing in bays, and it gave a very imperfect protection to the right to exclude foreigners. If once you got your fishing boats into a bay, everybody

knew that you could scarcely keep them from landing, if they wanted to land there, in a sheltered place—sometimes, of course, the shelter is less than at other places; there is a great deal of difference between the shelter in St. George's Bay and the shelter, say, in the Bay of Islands. But there is a good deal of shelter in St. George's Bay. You see here on the map the way in which, from the north-east, the south and the south-east you have absolute shelter in St. George's Bay, and shelter from many winds, and probably very severe winds, in that part of the world. So everybody—not merely Great Britain, but the United States and everybody else—said: "Bays must be separately treated, both for general territorial purposes, and of course for fishing purposes." Fishing purposes followed general territorial purposes. Once you said: "That bay is my territory;" the moment you have established its territoriality, then you have a right to forbid foreigners to fish in it. So that, of course, the territorial right carried the fishing right. And everybody said: "We must have these bays territorially." Who said so? I pointed out on Friday afternoon: First of all, Great Britain and France sit down together and say so, in 1686. Later on, the United States and France sit down together and say so, in 1778—four years before this. Four years before this all the three powers had agreed that their bays should be territorial. What is the effect of that on the fishing? Without expressly saying a word about fishing, the effect of it is that each nation assumes the right to keep its own bays to itself and keep others out. And, therefore, when you come down to the treaty of 1782, here, the preliminary article—and they are dealing, 1117 then, with the right they want to get over all our dominions—the negotiators say: "We want the bays, as they are commonly understood. We do not want to have any doubt upon the subject. We will have the words in." And therefore they put them in, out of greater caution. Well, now, they have got them in. Did they get anything by putting the words there? Whose bays were they? That is the point. Because I am going to establish, and am going to give some time to the answer to the question put to me by Dr. Lohman, as to whether I contend that in 1818 they renounced anything which they did not need to have renounced. I say in 1818 they renounced nothing that they did not get in 1783. In 1783 Great Britain said to them: "You shall fish along our coasts, and you shall fish within our bays." And the United States knew what that meant. They knew that it meant: "We will give you liberty to enter our territorial waters, not only those territorial waters which are 9 miles or 3 miles all the way around the coast, but those other territorial waters which do not depend on a coast-line at all, but which are territorial waters because they are within a bay. We will give you liberty to fish there." That is what the United States got



in 1783—not merely the 9-mile limit round the general coast-line, but any number of miles comprised within a bay. The United States knew that each of these bays was treated as the private property of Great Britain—every one of them. The moment you got to bays, and could draw a line from headland to headland according to the conventional arrangement between all the European powers concerned in British North America, that bay was private property, and the United States, if it had simply said: “I want to fish on your coasts, and within the 9-mile or the 3-mile limit,” would have been left very doubtful and uncertain as to whether they had the right to fish in the middle of a bay like that; because they had only got the coast-line fishery, and not the right to fish in the middle. So they asked for bays. They said: “We will not leave the thing in doubt.” And that is why they put the words in. So that is why on Friday I carefully began my argument by asking: “What did everybody understand to be the international law in regard to bays in 1818 in that part of the world?” Because I am not dealing with other parts of the world. I do not care, and really do not know very well, what the international law may be in Norway or elsewhere. You may have a totally different principle adopted in other parts of the world, by reason of difference in treaties or a difference in conditions; but in these parts of the world, before any of these documents came into existence, before 1783, before anything later than that, you had all the European powers agreeing that their bays were as much their property as any meadow within their dominions. And therefore the United States said: “Now, we want fishing; and if we want fishing, we must have something more than a coast-line. We must have the bays.” That brings me, therefore, to the treaty.

THE PRESIDENT: If you please, Mr. Attorney-General, will you tell us what is the exact difference between a bay and a creek?

SIR W. ROBSON: I should have said that a creek is a smaller bay.

THE PRESIDENT: The difference is in the width?

SIR W. ROBSON: I think it is largely in the width, yes. Taking bay, creek, and inlet, the bay is the larger, the creek the smaller, and the inlet the smallest of the three, like the mouth of a river—

JUDGE GRAY: I think, Mr. Attorney-General, that creek, as I have understood it, and as it is understood with us, means a small stream.

THE PRESIDENT: The stream itself, or the mouth of the stream?

JUDGE GRAY: The stream itself, which would include the mouth. A creek is a small stream, I think so.

SIR W. ROBSON: It may be so.

SIR CHARLES FITZPATRICK: A small stream emptying from the land into a bay?

JUDGE GRAY: Yes.

SIR W. ROBSON: That may be the meaning of “creek.”

THE PRESIDENT: But in this connection can it be a stream? There is no question about fishing in rivers?

1118 SIR W. ROBSON: No.

THE PRESIDENT: There is only the question concerning the fishing in the sea.

SIR W. ROBSON: I should have said, speaking humbly on the matter, that a creek was the expression applied, not to the stream, but to the indentation of the coast into which the stream emptied—an estuary; I think that is really what we should call it. A stream is not an inlet of the sea. I think from the way in which the word “creek” is used here, that it refers to the sea coming into the land, rather than to a stream coming down from the land towards the sea; but probably the correct meaning is a stream broadening into an estuary.

JUDGE GRAY: A small river?

SIR W. ROBSON: Yes: where the estuary is broad enough to look not as though it were formed, not by the stream or river coming down, but by the sea curving in at that point. It is an indentation. I think a creek must be treated as an indentation in the coast by the sea. But it may be very often indicated as the estuary into which the stream flows. Of course it does not much matter, for my purpose, what its precise meaning may be. One sees how it is used, in a general sense, and we all know what a bay is. The creeks do not have names; at least, they do not have names on the map. The bays do have names on the map. So that we know where we are when we are talking of bays, and we do not quite know where we are when we are talking about creeks.

THE PRESIDENT: So that the smallest indentations of the coast are not bays. The smallest indentations of the coast would be creeks?

SIR W. ROBSON: I should say that they are bays in form, though perhaps not in dimension; but that, without any very exact dividing line between a creek and a bay, I think it may be taken that creeks are smaller than bays; that creeks generally are smaller than bays generally. You might, I daresay, find a creek which might be larger than some small bay; but still I think that they must be treated as indentations of the coast.

Now, then, I have come, therefore, to the first point to which I desire to draw attention, making a distinction between the “bay” and the “coast,” for purposes of territory and fishing: Namely, that nobody in taking a right desires to run any risk of having that right limited. And there was just the possibility, which would occur to any ingenious person, that if they relied on the word “coast” by itself, though geographically the word “coast” would give them all they wanted, because it would give them the coasts of the bays as



well as the other coasts, and although geographically they knew it would give them all they wanted, yet they thought: "We must make quite sure. Politicians have a way, which geographers think nothing about, of locking up these bays. They say: 'We will not let you go to the coast of the bay, because we are going to take the whole of the bay as part of our territory.' They have a way of drawing the line from headland to headland, and, therefore, as we are taking a right, and want to have it include everything, we will not rest on the word 'coast,' but we will have in the word 'bays.'" The very fact of their doing that shows that they appreciated the distinction which I say existed between the different component parts of the coast—a very marked difference, and with a very very great result upon the extent of the water being open to the fishing. Because, if you have merely the 9 miles or the 3 miles from the coast, then you miss all the interior of the large bays. If your grant had simply been: "You shall have 3 miles all the way round the whole coast," and afterwards your fishermen had come into the bay and said: "We want to fish here," the territorial authorities would have said: "You shall not. I have only given you 3 miles round the coast. But the middle of this bay is not open sea, as you seem to think it is. The middle of this bay is my private property." That is what we should have said, if America had asked for and got nothing but the 3-mile limit. The moment that an American fisherman came into that bay, in the middle of it, he would have been ordered out. He would have said: "But I thought I had a right to fish all the way around the coast." "So you have," would have been the answer, "three miles all the way round; but you are more than 3 miles here." "But am I not in the open sea?" "No," the answer would be, "you are not in the open sea. You are where your own country in 1778 agreed should be treated as private property; where France has agreed shall be treated as private property; where Great Britain has agreed shall be treated as private property, and therefore you shall go out." And the American negotiators, knowing that, said: "We will have 'bays' put in;" and they are put in.

I now take the next step, and that brings me to 1782, and, as I say, I have been dealing with this argumentatively upon documents. Now I come to something better than an argument upon a document, something that speaks more clearly and more strongly, and not quite so diffusely as any one when he is arguing on a document; and that is the Delaware Bay incident. That is after 1783, and before 1818. In the year 1793, this one incident alone appears, in my very humble and respectful submission, to be conclusive in favour of my case. What is territorial jurisdiction? It is the right to prevent anybody from fishing except your own subjects; that is to say, so far as your own waters are concerned, When I am talking about territorial

jurisdiction, of course, I am thinking about fishing. In 1793 a question arose that had nothing to do with fishing. It was a question which turned entirely upon territorial jurisdiction. A French ship captured an English ship in the Bay of Delaware. We are all so familiar, now, with the controversy that I need not give any references to it. The United States said: "You have no right to come and carry on operations of war on my territory." And what did Great Britain do? Great Britain at once wrote to the United States and said: "That bay is your private property." Great Britain did not say that the French ship had captured the English ship within the 3-mile limit or the 9-mile limit off the coast. In all that controversy the coast was never referred to. The bay alone was referred to. I do not think the word "coast" is mentioned in the whole controversy. Everybody understood that the coast only carried the cannon-shot distance, or whatever the distance then was; that is all; but the bay has nothing to do with the cannon-shot at all. And so they demanded reparation, and everybody agreed that that bay was the private property of the United States. Mr. Warren has had great difficulty in dealing with Delaware Bay in the course of his argument. When I come to deal with his argument upon it I think I shall have the pleasure of disclosing it as a master-piece of ingenuity; because he wanted to claim that everybody's bays except his were open sea; and in order to justify his own bays being treated as private property, he laid down all the principles for which I am contending with regard to my bays. I shall call Mr. Warren as a witness in favour of my argument, in due course—a willing witness—because he has laid down all my principles, and done it much better and more concisely than I could do it myself. He said: "Delaware Bay is my bay, not because there is a River Delaware flowing into it,"—that was one of the grounds taken by the United States Attorney-General. He said: "If there was no river there at all, equally it would be the private property of the United States, because it is a bay; that is all;" no other reason was wanted than that. There was no question of 9 miles or 10 miles—it was a bay. That took place in 1793, following upon the treaty of 1778, following upon the treaty of 1783, in every one of which international documents the bay is treated as the private property of the State whose coast is indented thereby. And it shows what the attitude of the United States was. And it was followed immediately afterwards by a treaty in which this view of bays is put into one of the great international documents of that part of the world—Jay's Treaty, the treaty of 1794.

Now, when the United States said: "Delaware Bay is a bay," what did it mean, so far as fishing is concerned? It meant, "It is my property, and nobody shall fish here unless I wish it—nobody." Territorial jurisdiction carries with it the absolute right to control the fishery.



In 1794 there is an international document of the greatest importance, and I am drawing attention to this because Dr. Lohman was good enough to show me that on Friday I had directed attention to the question of jurisdiction, but that he wished me to deal most with the question of fishing. Of course I am drawing attention to this to show jurisdiction carries the right of fishing. I refer to the 25th article of the treaty of 1794, to be found at p. 23 of the British Case Appendix. It says here:—

“Neither of the said parties shall permit the ships or goods belonging to the subjects or citizens of the other to be taken within cannon shot of the coast, nor”——

That “nor” is a very important disjunctive—

“nor in any of the bays, ports, or rivers of their territories, by ships of war or others”

And so on.

“But, in case it should so happen, the party whose territorial rights shall thus have been violated shall use his utmost endeavours” etc.

1120 That is the year after the Delaware Bay incident—the very year after. Delaware Bay is a big bay. There is no question about 6 miles—no question about coast-line or coast-line limits. It is a big bay. And here, so much alarmed has the United States been by this incursion of European Powers into its bays, where they carried out their own battles, that it says: “We must have this made clear. England is becoming our commercial ally; she must promise to stand by us, the United States, if any nation presumes to come into any of our bays.” And that territorial right carries with it every other territorial right. Once you have established your jurisdiction over the bay as its sovereign, you have established also the right to exclude fishermen. And therefore that brings me to the first part of my answer to the question which I am much obliged to Dr. Lohman for having put to me, because it keeps me to this important point, which I am afraid I had forgotten. His question is:—

“Is there any document or fact before 1818 that proves that, either on the side of Great Britain or of the United States, in reference to the fishing rights of the United States, a distinction is made between coasts and bays?”

My answer so far—I am going on with it—is that there is in every document and every transaction a distinction observed between coasts and bays, indicating that bays are within the territory of the adjacent State; and when once they are within the territory of the adjacent State the adjacent State has complete control over all their fishing rights.

All I have to do to show that fishing rights are subject to the State is to show that the place where they fish is part of the territory of a State. That is undoubted. If I am right in putting these bays into these territories I have in that case complete control over the fishing rights in every bay—long before I come to 1818, before I come to 1783; and in 1783 I have given those rights to the United States—given them all, in every bay along the coast. And later we shall see how they come to be renounced, and why—renounced, not at the suggestion of the United States, as Mr. Rush and Mr. Gallatin thought in their letter, or said in their letter, but at the suggestion of Great Britain.

The question of Dr. Lohman is:—

“Did not at that time, before 1818, the disputes between the two powers rather refer first to the right of fishing on the coast, taken in a general sense, without making any distinction between coasts and bays . . .?”

Well, I say the distinction is there politically, geographically, and is acted upon for all territorial purposes, including the right of fishing. That was this treaty that I have just read, where the two nations combined to respect the territorial jurisdiction of each over these embayed waters.

THE PRESIDENT: Your conclusion, if I understand you well, Mr. Attorney-General, concerning article 25, is this: That although concerning fishery rights there is no special distinction made, this distinction is made concerning territorial rights in general, and as fishing rights are included in the territorial rights, you come to the conclusion that this distinction applies also to fishing rights?

SIR W. ROBSON: Yes, Sir, I am much obliged to you. That exactly states my point—exactly. That is how I connect my argument with the fishing rights which, otherwise, might seem to be rather remote. That is the link between what I call the territorial and the fishing aspect of a bay. The moment I establish that, territorially, the bay is mine, I have then established not only that I have a right to the fish, but that I have a right to turn anybody out of it.

DR. DE SAVORNIN LOHMAN: Do you not think, Sir William, that there is a difference when there is a fishing treaty, and in that fishing treaty no mention is made of a territorial right? Does it not make a difference in explaining the article?

SIR W. ROBSON: I am much obliged, Sir. Of course, if there is a treaty relating to fishing, it is a treaty relating to one of the territorial rights.

DR. DE SAVORNIN LOHMAN: Yes.

SIR W. ROBSON: Certainly. Of course, the adjacent State—I call it adjacent; that is the State owning the land on each side of the bay—may part with any of its territorial rights over the waters, or



it may retain them all, or it may part with one of them upon terms.

Now, in 1782 or 1783 it parted with one of them. It parted 1121 with the right of fishing. And the only question is what it gave in 1783. I say it gave the right of fishing in the whole of that bay, the Bay of Islands (indicating on map); that it gave the right of fishing inside that bay. The United States say: "No. It did not give the right of fishing inside that bay, because it had not got it to give. It did not have the bay. All it had was a limit of water around the coast." That is the part of the argument to which I have been devoting so much attention. I say the first question I have answered is: What had we to give in 1783? Had we bays, or had we not? We acknowledged that we had not the banks to give. We used to have them, or used to claim them. But we said: "We will now acknowledge that, so far as the banks are concerned, we cannot treat them as our private property any longer. We will therefore acknowledge your right. We do not make any grant to you of bank fishing, but we acknowledge that, now that you have become an independent nation, you will, with other nations, have the right to fish on these banks." But, when it comes to bays, I say we did not acknowledge their right to fish in them at all. We said: "We will there only give you a liberty to fish; because we claim to own these bays. We claim to be their master." And the question is: Had we any right to make that claim? Therefore I have referred to the treaty and showed that everybody said we had a right to make that claim. The object of my argument now is to show that in 1783 the right to fish in the bays was claimed by us and given by us; and then, in 1818, we said to the United States: "We are not going to give you that right any longer. We are going to give you a limited portion of that right. We are going to give you that right over a limited area." That is the better way of putting it. "But over the rest of the area we shall insist that you abandon all the rights that we gave you in 1783. And among the rights we gave you in 1783 was fishing inside these bays like Chaleur, Miramichi, and the other bays."

I say, therefore, once I establish that in 1783 I was master of the bays, by the consent and with the acquiescence of America, it follows that in 1783 they took their right from me, and not from international law. They were my bays, and I gave them the right to enter, and when at last I said: "I am going to withdraw that right from you; I am going to make you renounce it;" then they renounced the right to fish in the bays. The argument about fishing and the argument about territorial jurisdiction are, of course, exactly on the same footing. I cannot establish my right to exclude them from the bays in fishing unless I show that I had the right to do it: first of all, that I had the power to give them the liberty, and afterwards that I had the power to insist upon their renunciation of it.

JUDGE GRAY: Sir William, I only put this question to you for the benefit of your comment: Was not the position of Mr. Warren that in addition to the bays that might be claimed as territorial, that he put it as a proposition of international law—whether that is good or not I have no opinion—that in addition to the territorial bays, by reason of their being not wider than 6 miles, and therefore included and covered by the 3-mile limit on both sides, there were other tracts of water that might be claimed as territorial under special circumstances, such as an assertion of jurisdiction by the nation whose lands and shores enclose the bay, public assertion to all the world, and acquiescence by one or more nations in that claim? I think his contention was that that was necessary in order to establish the territoriality of a large bay. And therefore he distinguished the Delaware Bay incident on the ground that it is now considered a territorial bay because of that public assertion of jurisdiction and acquiescence by two such countries as Great Britain and France.

Now, do you claim that, as to these larger bays, there has been such an assertion of jurisdiction and such acquiescence, by silence or otherwise, on the part of any one great nation, or other great nations, in the claim, as would establish their territoriality on that basis?

SIR W. ROBSON: Yes, Sir. Now, may I take Mr. Warren's argument, there? I am much obliged to Mr. Justice Gray for directing my attention to it. When Mr. Warren came to Delaware Bay, he, of course, had to meet this difficulty: that if bays were not separately treated as territorial units, with all the consequences of territoriality, he would lose Delaware. And so he said: "I am entitled to keep Delaware, because Great Britain acquiesced and France acquiesced." That is quite true. Does he suggest, then, that he had no right to keep Delaware until they acquiesced? That follows from his argument. Here he will find he is in a vicious circle. When the territoriality of Delaware was invaded by these two ships of war, 1122 he said: "You have no business here." That is what he said to France. What would he have replied if France had said: "This is open sea. It is not a United States bay, because Great Britain and France have not acquiesced in its being a United States bay?" His answer had nothing to do with their acquiescence. It was his argument that induced their acquiescence. He said: "It is a bay." And he put forward an argument to show that it was a bay, and that he was entitled to it by international law. He quoted Grotius. He did not quote Lord Castlereagh. He did not quote Lord Bathurst. He did not quote the French Minister for Foreign Affairs. He quoted Grotius. And it was because he quoted international law, and contended that this was his bay, that France and Great Britain gave their assent. In other words, if I may take Mr. Warren back a hundred years or so, the Attorney-General quoted for the United



States, or for the State of Delaware, the very arguments in favour of the territoriality of Delaware Bay that I am now quoting in favour of the territoriality of Chaleur Bay. And it was those arguments which induced France to say: "Yes, you are quite right. This is a territorial bay. We were wrong." Now, he says it is a territorial bay because they assented. I say: "Not at all. They gave their assent not to make it a territorial bay, but they gave their assent because you convinced them that it was a territorial bay."

So that, in 1793, the argument of the United States was that this bay was what I have called State property. And everybody assented to it. And if everybody was wrong, if everybody is wrong now, if these bays are not to be taken as territorial, then I have not the slightest hesitation in saying, with all the emphasis that I am able to command, that the territoriality of Delaware Bay and Chesapeake Bay is gone. If it is the case now that all the bays in the world—or, saying nothing about the rest of the world, but merely about this part of the world—if all the bays of this part of the world are to be treated as non-territorial, in spite of treaties, acquiescence, conduct, through a century and more than a century—through two centuries of time—the arguments that make them non-territorial apply every bit as much to Delaware Bay as they do to Chaleur.

I cannot imagine—I say it emphatically, but respectfully—I cannot imagine an argument that would give the United States Delaware and Chesapeake and refuse to Canada Chaleur and Miramichi. The only argument that Mr. Warren can suggest is: "You, Great Britain, assented to Delaware and Chesapeake being our bays." Our answer is: "Yes, we assented because you asserted. That is why we assented. You said they were territorial. You argued that they were territorial, and we never thought of denying it. But now you are coming and saying that all the arguments you used then were wrong. Your Attorney-General said: 'Quite apart from Delaware River, this bay was State property.' We believed him. We think he was right. But if you say he was wrong, and you get an international tribunal to say he was wrong, or to say that we are wrong in Chaleur, then we were wrong in giving our assent to Delaware and Chesapeake. We withdraw our assent. No longer can you claim that they should be territorial."

It would be a very nice argument indeed if the United States were able to keep its own bays and get into everybody else's. It would be an admirable argument, and Mr. Warren would be entitled to enormous credit for it; but it cannot possibly stand. Our assent, our acquiescence in the territoriality of Delaware and Chesapeake Bays goes, if my argument here to-day goes. Because if my argument here to-day is held wrong, we were wrong in assenting to the United States contention in 1793, and our assent is of no importance.

THE PRESIDENT: May I come back, Mr. Attorney-General, for a moment to article 25 of Jay's treaty, and the dissent of opinion which appeared? This question appears to me so very essential, that it is perhaps useful to fix the two opinions. The question put by my colleague Dr. van Lohman—I do not wish to say the opinion of Dr. Lohman—but the question put by him, because our questions are not to be taken as expressions of our opinion—

SIR W. ROBSON: I take them as the questions of the whole Tribunal, of course.

THE PRESIDENT: Yes. The question put by Dr. Lohman supposes that the treaty of 1818 contains a specific provision concerning fishery rights which could make an exception to a general rule concerning territorial rights, even if such rule concerning territorial rights should be established?

SIR W. ROBSON: Certainly.

1123 THE PRESIDENT: Whereas your contention, Mr. Attorney-General, is that the general rule concerning territorial rights embodies also fishery rights?

SIR W. ROBSON: Yes.

THE PRESIDENT: That it concerns also the regulation of fishery rights. That seems to me to be the difference between the two opinions concerning the applicability of an argument drawn from the second paragraph of article 25 of this treaty of 1794.

SIR W. ROBSON: Yes, but of course I admit as fully as can be, when once I have given a fishing right, of course I have qualified my territorial powers, and I am bound to give effect to the fishing right. There is no doubt about that. The only question here is: Over what area did I give the fishing right. That is the point, and that has to be decided by discovering the area over which I had jurisdiction. Did I, when I said you might fish in the bay, mean you may fish within 3 miles of the coasts of the bay, or did I mean you may fish over the whole of the bay? The United States say: "You meant only that you might fish within 3 miles of the coast." I say: "No, I meant more than that; I meant to give you, and you meant to take, the right to fish within the whole of the bay though it be 10 miles from the coast. And the reason why you asked for that and I gave it was that at that time I was speaking of the whole of that bay, not merely of the 3 miles from the coast, as my own territory, and I was in the habit of drawing my coast line so as to include that bay in my territory. I never drew my line round the coast inside the bay. I drew it across the bay from headland to headland, and made it all mine; and you, the United States, at that date, were doing exactly the same thing. That is what you did at Delaware; that is what you did at Chesapeake. You claimed a complete jurisdiction, and, having got it, you said, 'No one else shall fish here.'" That was said



by the State of Delaware, who excluded the fishermen. We, on the other hand, having got it, said: "You, the United States, shall fish here." We gave you more than the 3-mile limit; we gave you the 10- or the 20-mile limit inside that bay—because it was ours to give. And then when we change our minds and say we are going to cut down your fishing rights, we use the same expression as we used before. That was, the word "bay," and we use it in reference to the whole of the bay. The bay is the whole, is the unit, and we said: "You shall not fish there;" and you agreed and renounced the right to fish in the whole of the bay. And the reason why you did it was because you knew that what you were giving up was what you had got in 1783. In other words, whenever you talked about bays, you did not mean a coast line around a bay; you meant bays. It is quite true, absolutely true; I do not for a moment seek to qualify the suggestion that Dr. Lohman indicated in the questions which have been of so much assistance to me; and I am very much indebted to the Tribunal for bringing my mind to the point and not letting me argue at large, when all the time I was leaving untouched some difficulty in the minds of my Tribunal. I am much obliged to have had my attention directed to this point: that the word "coast" might have been used in a way inclusive of "bay," and the word "bay" just thrown in, to mean nothing in particular. I say that it cannot have had that effect.

Now may I take again the word "bay" to show how the United States treated it—

SIR CHARLES FITZPATRICK: Before you do that, may I revert to the Delaware Bay incident, and ask you whether or not, independently altogether of the question of acquiescence on the part of England and France in the claim of the United States, the incident may be usefully referred to for the purpose of ascertaining the meaning which the parties to this treaty, that is to say, the Americans and England, put upon the word "bay"? On the part of England it is asserted that the Bay of Delaware is a bay geographically speaking; on the part of the United States they say it is a bay. This is the construction put upon the word "bay" by the parties to the treaty. And the United States gives as the reason for the assertion—

"the corner stone of our claim is, that the United States are proprietors of the lands on both sides of the Delaware, from its head to its entrance into the sea."

That is with respect to Delaware Bay.

SIR W. ROBSON: Yes, p. 55 [British Case Appendix].

SIR CHARLES FITZPATRICK: There is no claim of acquiescence there.

1124 SIR W. ROBSON: No, because they had not got it.

SIR CHARLES FITZPATRICK: It is a claim in respect to the geographical situation.

SIR W. ROBSON: Yes; geographical situation and character—

“the corner stone of our claim is, that the United States are proprietors of the lands on both sides”

That is the corner-stone.

SIR CHARLES FITZPATRICK: He repudiates the suggestion of defensibility in the preceding paragraph, if you will notice.

SIR W. ROBSON: Yes. Because the question was the status of this bay at the time of the seizure. That is the question before any acquiescence was possible or not.

I do not read the Attorney-General's opinion because it has been read so often, and its general sense is, of course, present to our minds.

Well, now, may I just follow it up by another reference? I think it is very near the same page—yes, on p. 57: Mr. Jefferson (United States Secretary of State) to Mr. Hammond (British Minister at Philadelphia):—

“For the jurisdiction of the rivers and bays of the United States the laws of the several States are understood to have made provision, and they are moreover as being land locked, within the body of the United States.”

Now what does that mean? Really that sentence alone ought to carry me home. He is speaking there of bays so as to include Delaware and Chesapeake; he calls them landlocked. He does not mean that they were 6-mile bays. When he was writing in 1793 nobody had ever thought of the 6-mile bay; there was no mention of it by anybody anywhere. What he means is: “Those bays are our property because our land is on both sides of them; and if they are our property we have a right to do as we like with the fishery.” And the State of Delaware actually did monopolise the fishery, and forbade anyone—even their fellow-countrymen, I believe—to fish within the bay.

So that when the United States asked for bays from us, they meant such bays as they claimed for themselves in their own territory. And that meant all geographical bays with every right that jurisdiction carries with it, including the right to give a fishery or the right to withhold a fishery. How then can it be said that the word “bays” was a useless word? Would it be fair to the meaning of the parties to treat it as a superfluous word thrown in from the legal instinct or habit of verbosity?

I quite agree that you may have a great many words, as I have already said, which are of very little use in a document, and which you may very fairly ignore. But can you do so where the result to the parties is so vital? Can you throw out the word “bays” in view of the way in which each of the parties was treating it? On this very page—as my friend Sir Robert Finlay points out—they are



dealing with these two things (I will show this again later on). They are dealing with the coast line limit of jurisdiction—and the bays.

On the opposite page (p. 56) Mr. Jefferson is discussing with M. Genet, the Minister of France, this very question of coast limits, and he goes on to say:—

“I have now to acknowledge and answer your letter of September 13, wherein you desire that we may define the extent of the line of territorial protection on the coasts of the United States, observing that Governments and jurisconsults have different views on this subject.

“It is certain that, heretofore, they have been much divided in opinion as to the distance from their sea coasts, to which they might reasonably claim”——

And then he goes on to say that some say 1 league, others say 3 leagues; and then he says that for the present he would take—

“one sea-league, or three geographical miles from the sea shores.”

Now mark the next sentence:—

“Future occasions will be taken to enter into explanations with them, as to the ulterior extent to which we may reasonably carry our jurisdiction. For that of the rivers and bays of the United States, the laws of the several States are understood to have made provision, and they are, moreover, as being landlocked, within the body of the United States.”

1125 That is the same passage that I read before. But my friend

Sir Robert Finlay has been good enough to remind me that it ought not to be read by itself; it must be read in contrast with what precedes, and then it gains a double force, because what precedes is exactly what we have been discussing so much—the general coast line. Now, says Mr. Jefferson, we may settle the general coast line at 1 league, 2 leagues—we will try to come to some agreement about that; and then goes on, leaving the general coast line as far as bays are concerned that is, outside the coast line altogether. And therefore each State of the United States has made the proper provision. They are landlocked, they have nothing to do with the coast line. So that enables me to meet the point contained in the question:—

“Is it probable or not that the Americans, in renouncing the right of fishing within 3 miles of any of the coasts, bays, harbours and creeks, intended to distinguish, for the first time, coasts and bays . . . ?”

I say they did not intend to distinguish for the first time between coasts and bays in 1818; because here in 1793 they are distinguishing between coasts and bays in the most explicit and particular manner, saying: “Fix what limit you like for coasts; but as far as bays are concerned they are a totally different thing—they are landlocked.

We claim them absolutely; we have nothing to do there with coast line limits."

[Thereupon at 12 o'clock the 'Tribunal took a recess until 2 o'clock P. M.]

AFTERNOON SESSION, MONDAY, AUGUST 1, 1910, 2 P. M.

THE PRESIDENT: Will you please to continue, Sir William?

THE ATTORNEY-GENERAL, SIR WILLIAM ROBSON (resuming): I am sorry I am going over ground so often trodden I must apologise to the Tribunal, but I need not say the subject is one of such importance I am sure I shall have their indulgence in dealing with it.

I have come to the letters in 1793 referring to the Delaware Bay incident, and I have explained that the significance of that incident with regard to this argument is that the United States, who are claiming exclusive jurisdiction, which of course included the right of fishing, and I have pointed out that in fact, in that bay, the United States had exercised the right to exclude all fishermen except its own. The State of Delaware did that. And that was the footing upon which both parties treated "bays."

Perhaps it will be within the recollection of the President of the Tribunal, that when we were dealing with the treaty of 1794, which was made after the Delaware Bay incident (article 25), each nation agrees that it will treat its bays as they stand, as they are—that it will treat them as their own separate property, and the learned President drew attention to the fact that in 1806 that provision was omitted, when in 1806 the parties came to endeavour to make an agreement.

Well, I have followed up that enquiry, and I find that the reference to bays in the article of the 1806 draft, which corresponded to the article in the 1794 draft, which referred to bays, was dropped out because the United States thought it unnecessary. The language used appears in the American State Papers, Foreign Relations, vol. iii, p. 83. It has not been before the Tribunal before. It is very confirmatory of my present argument, namely, that "bays" were regarded as so much national property that it was really beneath the dignity of a State to seek that they should be protected from foreign enemies, any more than any other part of their territory should be protected.

Mr. Madison is writing to Mr. Monroe on the 5th January, 1804. They are discussing what shall be done with regard to the claim for impressments which England was putting forward. England was claiming the right to capture her seamen, or those whom she said were her seamen, wherever she could find them. Mr. Madison com-



plains of this practice, and he is dealing then with the proposal of a treaty, or for a treaty which should put an end to it. He says:—

“The first article relates to impressments from American vessels on the high seas. The commanders of British armed vessels have, as is well known, been long in this practice. They have, indeed not only continued it, under the sanction of their superiors, on 1126 the high seas, but have with impunity, extended it to our own coasts, to neutral ports, and to neutral territory, and in some instances to our own harbors. The article does not comprehend these later cases.”

That is the article which relates to impressments. He says:—

“The article does not comprehend these later cases, because it would not be very honorable in Great Britain to stipulate against the practice of such enormities, nor in the United States to recur to stipulations as a security against it; and because it may be presumed that such particular enormities will not be repeated or unpunished, after a general stop should have been put to impressments.”

So when they came to the draft treaty of 1806, when they were dealing with each other's territory, and forbidding and saying they would not allow foreigners to come and fight on or in their territory, they thought it unnecessary to repeat this stipulation as to “bays” because they thought it was beneath their dignity. That means, that “bays” are so much a part of our territory, there is no need to mention it in the particular article of the treaty, and therefore they did not mention it.

That answers the question put by the learned President as to why, having mentioned them in 1794, when they came to a corresponding article in another treaty of commerce, in 1806, they are dropped out.

THE PRESIDENT: By whom is that paper?

SIR W. ROBSON: This is by Mr. Madison to Mr. Monroe. He writes it in 1804, but the reason why it appears as instructions in 1806 is because I find another reference (p. 120 of this volume) where instructions are being given to the Commissioners who had to work out the treaty of 1806. There it is said:—

“The instructions given to Mr. Monroe, January 5, 1804”——  
the ones I have just read—

“having taken into view and being still applicable to a great proportion of the matter now committed to your joint negotiations, it will be most convenient to refer you to those Instructions as your general guide,”

So that the instructions of 1804 were put forward as the guide for 1806. The Commissioners in 1806 saw this paragraph I have just read, saying: “We need not stipulate about bays, because we must assume they will be respected and treated as our own property,” and therefore they did not repeat the stipulation in 1806 which they had put forward in 1794. Of course that was relating to impressments, it

was not relating to fishing, but it is an indication that the United States took up the position then which we take now, namely, your bays are yours, ours are ours, they are ours completely, ours so as to prevent impressments, ours so as to give us complete control over fisheries.

Now, I have come to 1806, and from the point of view of the United States argument that is an important period, but I propose to pass over it, because I am dealing now simply with the point put to me by the Tribunal.

It is said in 1806 that the parties negotiated for a treaty, but the negotiations came to nothing; nevertheless Great Britain at that time stipulated for a 3-mile limit, and that is the foundation on the part of the United States of their theory of the 6-mile bay. They said we got our 3 miles in 1806, and all we have got to do, when once we have got the 3-mile range, is to double it, and it gives us our 6-mile bays.

Well, now, they did not get their 3 miles, because the agreement made was 5 miles—the provisional agreement—and that went off on other ground. I am not going over that because I am not going to touch the United States contention. I am dealing with the other point, as to whether bays were dealt with separately, and I therefore come to the negotiations in 1814 and 1818, and they put this point really beyond argument.

I will take the passages upon which Mr. Warren relied, I will take the evidence and documents to which he referred, that is why I must present the appearance of inflicting a good deal of repetition upon the Tribunal, but I have to go over my opponent's ground in order to draw different conclusions from his facts. But let us see what the facts were in 1814. The United States had enjoyed this privilege of fishing in our bays since 1783. It had given rise to difficulty. It was not so much, as Dr. Lohman points out, the fishing in 1127 the bays that gave rise to difficulty. It is very doubtful that there was much fishing in the bays. It was the landing in the bays that gave rise to difficulties.

Then came the things of which we complain. The Americans got there first, and took up places, and so on, and there was disorder.

But how were we to deal with the landing? There was only really one practical way of dealing with it. It was to say: "You shall not come into the bays at all." It was no use saying: "You may come into these bays where there is very little cod-fishing, but you shall not land." Therefore, the only way in which we could effectually prevent the occurrence of this mischief was to say: "You shall not come in at all."

Now, that is what we said, and from this moment the "bays" are the principal thing to be considered. That is up to 1783 the "coasts" were the things that were the most talked about. "Bays" were fre-



quently added as a mere etcetera, a mere part of the more general term, because there we were giving the right. Now we are going to withhold the right. And we intimate that it shall be withheld on the coasts which are not given to them by treaty, and also particularly withheld so far as the bays are concerned. The word "bay" begins to be more important than the word "coasts," and now I will ask the Tribunal in following this now so familiar evidence to see how the word "bay" becomes the dominant word in this enumeration of "coasts, bays, &c." "Bays" are the things they begin now to think about, and to take care about. I will in the course of dealing with this correspondence draw particular attention to those passages in which it will be seen that Great Britain demanded the renunciation. There are three or four of those passages to which I will draw attention as we come to them chronologically.

Mr. Warren put in this excellent little—booklet I will call it: "Notes from the Letters and Despatches of Lord Castlereagh," and if the Tribunal will kindly take p. 4 of that and refer to one passage, it will make my point clear throughout the succeeding letters.

Lord Castlereagh is writing to His Majesty's Commissioners appointed to negotiate, and the letter is the 28th July, 1814. He says on p. 4, speaking of the fishery, at the second paragraph [Appendix (A), *infra*, p. 1356]:—

"But the point, upon which you must be quite explicit, from the outset of the negotiation, is the construction of the Treaty of 1783, with relation to the Fisheries. You will observe that the third Article of that Treaty consists of two distinct branches:—the first, which relates to the open sea Fishery, we consider a permanent obligation, being a recognition of the general right which all nations have to frequent and take fish in the high seas."

Now, the first one to be remembered was the Gulf of St. Lawrence in the bank fisheries:—

"The latter branch"—

That included the bays and creeks. The latter branch was the liberty as opposed to the right.

"The latter branch is, on the contrary, considered as a mere conventional arrangement between the two States, and, as such, to have been annulled by the war. This part of the Treaty has been found to be productive of so much inconvenience, as to determine his Majesty's Government not to renew the provisions of it in their present form; nor do they feel themselves called upon to concede to the Americans any accommodation within the British Sovereignty, except upon the principle of a reasonable equivalent in frontier, or otherwise; it being quite clear that, by the law of nations, the subjects of a foreign State have no right to fish within the maritime jurisdiction, much less to land on the coasts belonging to his Britannic Majesty, without an express permission to that effect."

Now, said Mr. Warren, what is the maritime jurisdiction? He said it is 3 miles from the coast. Now, what is the maritime jurisdiction according to Lord Castlereagh?

When you turn to the treaty of 1783 and ask what is the latter branch, the latter branch there is the liberty to take fish on the coasts, bays, and creeks. The first branch is the right to take fish on the Grand Bank, in this great Gulf, and in all the rest of the open sea. That is one branch. That is outside the jurisdiction. That is a right. Now, then, says Lord Castlereagh, the latter branch, which is not a "right," which is a "liberty," which comprises the maritime jurisdiction, that covers coasts, bays, and creeks.

When one appreciates that, it is the keynote of the negotiation. It is the first letter. It is the keynote of the negotiation in 1814 1128 and 1818, and really when one appreciates that, Mr. Warren's argument is at an end, because he read this very passage. He said "maritime jurisdiction" means 3 miles, and therefore he said Lord Castlereagh meant there simply 3 miles from the coast. Not at all. Lord Castlereagh meant the bays and 3 miles from the coast. That is the maritime jurisdiction of England. That is the agreed maritime jurisdiction among all these nations.

It will become clearer as I go on, although I think it is clear there.

The bays, then, are placed by Lord Castlereagh within our jurisdiction, and with all the consequences that follow upon that, the right to prevent foreigners from fishing there.

Now on the 8th August (this is merely a formal document), the British Government gave notice that they "did not intend to grant gratuitously the privileges formerly granted by treaty to them of fishing within the limits of British sovereignty"—now the limits of British sovereignty included bays—"and of using the shores of British territory for purposes connected with the fishery."

Then the same expression "British jurisdiction" is repeated in several letters Mr. Warren went through. He went through them with one meaning. I do not need to go through them again. "British jurisdiction" did not mean merely 3 miles, it meant something else as well.

Now we come to an important letter of the 18th October, which is in the same little booklet, p. 9 [*infra*, p. 1358]. It is at the bottom of p. 9 and the top of p. 10. This is Lord Bathurst to the Commissioners at Ghent:—

"Secondly, the fisheries. You are to state that Great Britain admits the right of the United States to fish on the high seas without the maritime jurisdiction of the territorial possessions of Great Britain in North America; that the extent of the maritime jurisdiction of the two contracting parties must be reciprocal; that Great



Britain is ready to enter into an arrangement on that point; and that, until any arrangement shall be made to the contrary, the usual maritime jurisdiction of one league shall be common to both contracting parties."

That meant the usual maritime jurisdiction as usually applied to the coasts, but it does not mean we are giving up our bays, it does not mean we are confining our claim to jurisdiction to the coast line alone, and letting you take it all around the bays. If there is any doubt about that it will be settled in the later letters.

And then it says this also. The extent of the maritime jurisdiction of the two contracting parties must be reciprocal. What was it that remained in doubt? Only the coast line. As to that Great Britain is saying, whatever coast line we fix, it must be the same for you. That required settlement, that coast line question, but there was no doubt about the bays, none. That did not require any negotiation. The only part of the maritime jurisdiction that required settlement was the coast line.

Of course that observation about "reciprocal" would have an application if one thought of the Delaware Bay incident. Supposing they were thinking of "bays" at the time (I do not know whether they were or not) but it would mean this: "If you are entitled to keep us out of Delaware, out of your bays, we are entitled to keep you out of ours. We are not going to give you a maritime jurisdiction superior to that which we keep for ourselves. Therefore it must be reciprocal."

Really, if full meaning be given to those words, how important they are on this question! What do those words mean except this: "Whatever we agree about jurisdiction you must agree to. You have claimed to exclude us from fishing in Delaware; we are to have the same right, whether we exercise it or not. If you get bays we get bays, and for whatever purpose you get them, we get them. In fact, reciprocity was the very basis of the controversy at that time.

JUDGE GRAY: Do you attach any significance to that last sentence in that paragraph, they cannot agree to renew the privilege allowing Americans to land and dry?

SIR W. ROBSON: Yes; they cannot agree to renew the privilege allowing Americans to land and dry on the unsettled shores, and so on.

JUDGE GRAY: I mean in view of the fact that in speaking of the maritime jurisdiction of 1 league, which you say is from the coast, they do not mention the bays at all, except to say that the privilege of landing and drying cannot be conceded.

SIR W. ROBSON: Yes, we would not grant it.

JUDGE GRAY: Would not the inference rather be this, that the limitation of 1 league from the shore that was settled on ultimately  
1129 would apply to bays, and the only thing that they desired to call especial attention to was the privilege of landing and drying?

SIR W. ROBSON: I do not think that is quite their meaning. They say there is one doubtful element in maritime jurisdiction, that is the distance of territorial water from the shore, we must agree upon that, whatever we agree about territorial jurisdiction must be common to us both. Bays are not mentioned, but what is meant is, whatever you claim for maritime jurisdiction we are to have. You have got your bays, we are to have ours, and we have got ours, we are not going to let you into them.

SIR CHARLES FITZPATRICK: But landing and drying on a shore has nothing to do with maritime jurisdiction; it is territorial is it not?

SIR W. ROBSON: It was rather territorial, or land jurisdiction, but I think that is the meaning of the clause, taking it as a whole. Bays are not mentioned, and it is stipulated that each party shall have that, in effect; impliedly, because each party had to have the same jurisdiction over the water as the other had. Then having got that jurisdiction, Great Britain goes on to say, as she does in the next letter, we are not going to let you into our bays because you trouble us so much there with your landing rights, we are going to keep you out.

Then we come to the next letter which makes it a little plainer, that is the letter of the 18th October.

Of course, nobody then thought of giving up the bays at all. There would not be much reciprocity, if all this meant they were to keep Delaware Bay, and we were to give up Chaleur.

Then, we come to the protocol of the Conference at Ghent on the 1st December, 1814 (British Counter-Case Appendix, p. 141):—

“The American plenipotentiaries also proposed the following amendment to Article 8th, viz.: ‘The inhabitants of the United States shall continue to enjoy the liberty to take, dry and cure fish in places within the exclusive jurisdiction of Great Britain, as secured by the former treaty of peace;’”

Now, when we turn to the former treaty of peace, what was the exclusive jurisdiction of Great Britain? It was the “liberty” the sphere within which liberty to fish operated, “bays, creeks, and harbours.” That was the exclusive jurisdiction under that treaty. There is no other mentioned.

The same thing appears on p. 149. They all go back to the treaty of 1783. That is the keynote of all of my argument at present. There is a report of the American Plenipotentiaries to the United States Secretary of State on p. 149, and the passage to which I desire to refer is on p. 150 where it begins:—

“In consenting, by that treaty, that a part of the North American continent should remain subject to the British jurisdiction, the people of the United States had reserved to themselves the liberty, which they had ever before enjoyed, of fishing upon that part of its coasts, and of drying and curing fish upon the shores, and this reservation had been agreed to by the other contracting party.”



Then further:—

“We stated this principle in general terms to the British plenipotentiaries, in the note which we sent to them with our *projet* of the treaty, and we alleged it as the ground upon which no new stipulation was deemed by our Government necessary to secure to the people of the United States all the rights and liberties stipulated in their favour by the treaty of 1783.”

That is to say, the liberties which comprised bays within the jurisdiction of Great Britain. Now comes the important letter that I want to read of the 25th December, 1814, which Mr. Gallatin writes to Mr. Monroe. This is the first letter about renunciation. It is in the United States Case Appendix, p. 261. The Treaty of Ghent was not successful in so far as the fisheries were concerned; the parties could not come to an agreement. England had asked for a renunciation of the American rights. She had said: “You must abandon the American rights, at all events, over some part of the area.” Mr. Gallatin says that is what the Americans would not consent to. The passage to which I desire to call attention begins at p. 260:—

“On the subject of the fisheries within the jurisdiction of Great Britain,”—

1130 Which meant over bays—

“we have certainly done all that could be done. . . . But we have done all that was practicable in support of the right to those fisheries; first, by the ground we assumed, respecting the construction of the treaty of 1783; secondly, by the offer to recognize the British right to the navigation of the Mississippi; thirdly, by refusing to accept from Great Britain both her implied renunciation of the right of that navigation and the convenient boundary of 49°, for the whole extent of our and her territories west of the Lake of the Woods, rather than to make an implied renunciation, on our part, to the right of America to those particular fisheries.”

That shows that the renunciation is being asked for when the Treaty of Ghent is being completed and is objected to. That is the first step. This is the year 1814, the Treaty of Ghent is concluded, nothing is arranged about the fishery, and we come to 1815. There is just one passage, in passing, to which I wish to direct attention. It is in the report of Mr. Russell in the British Counter-Case Appendix, at p. 152, on the whole subject, and I do not know that the Tribunal need trouble to refer to it, because there is only one sentence that I might pick out by way of illustration. He is speaking of the powers of the British Sovereign over his subjects, and he says:—

“The British sovereign was always competent to regulate and restrain his colonies in their commerce and intercourse with each other, whenever and however he might think proper, and had he forbid his subjects in the province of Massachusetts, to fish and dry and cure fish in the bays, harbours, and creeks of Labrador, which, by the way,

had not immemorially belonged to him, it is not to be imagined that they would have conceived themselves discharged from the obligation of submitting, on account of any pretended right from immemorial usage."

He is only treating bays as being within the jurisdiction of England, and he is saying that if at any time the King of England had chosen to close bays against his own subjects, or anybody else, nobody should complain. I might just mention, by the way, that there Mr. Russell gives the reason, which was just beginning to be known, as to why they wanted the bays of Labrador and asked for them, and did not trouble about bays on the other coasts. He says that because of the humidity of the atmosphere in high northern latitudes, they could not very well dry their fish there. They did not care much about the privilege of drying and curing in high northern latitudes, but they wanted the privilege of entering the bays of Labrador because of the valuable fishery, not for the sake of drying and curing fish, but for the sake of catching them.

The next passage to which I wish to direct attention is contained in the letter from Lord Bathurst to Mr. Keats, dated the 17th June, 1815, and here we will see how bays are being treated. I refer to British Case Appendix, p. 63. Now we see bays emerging as the most important factor in the whole of the negotiation. Lord Bathurst, in the second paragraph, says:—

"You cannot but be aware that the IIIrd article of the treaty of peace of 1783 contained two distinct stipulations; "—

Then he goes on to set them out—

"the one recognizing the rights which the United States had to take fish upon the high seas, and the other granting to the United States the privilege of fishing within the British jurisdiction, and of using, under certain conditions, the shores and territory of His Majesty "—

And so forth. Then he says:—

"Such being the view taken of the question of the fisheries as far as relates to the United States, I am commanded by His Royal Highness the Prince Regent to instruct you to abstain most carefully from any interference with the fishery in which the subjects of the United States may be engaged, either on the Grand Bank of Newfoundland, the Gulf of St. Lawrence, or other places in the sea. At the same time you will prevent them, except under the circumstances herein-after mentioned, from using the British territory for purposes connected with the fisheries, and will exclude their fishing-vessels from the bays, harbours, rivers, creeks, and inlets of all His Majesty's possessions."

You are to exclude them. Now, bays are all-important. In 1783, when they are talking of coasts and bays, they might very well throw bays in as a mere descriptive word, because they are asking for everything and bays would be included. You might then say



"coasts" or "shores," and the word would be taken as inclusive of bays. Now the question is whether they shall be allowed to enter bays at all. Lord Bathurst says: "You will let them understand that they are to have certain rights, which we do not want to deprive them of, but they are to have their fishing-vessels excluded from bays, not speaking of coasts." That is a most important letter. You

1131 will see that it is dated the 17th June, 1815. The Treaty of Ghent is signed, the question of the fishery is left open, it is to be negotiated afresh. That is all that is said about it by Lord Bathurst. There is nothing about coasts. All he says is: "Understand, they are not to be allowed to go into our bays, because their going into them was a source of obstruction and disorder." True, they only want to go in there in order to land, but it would be no earthly use letting them go to within a short distance of the shore and then saying that they were not to land. A more effective remedy than that was necessary and Dr. Lohman, of course, is right when he says that the important thing in going into the bay was to land on shore. It was not the only thing, because they wanted also to fish; but the important thing in preventing them from landing was preventing them from going in at all, and that is the line then taken by England, never varied, and never departed from. Attention is now entirely concentrated on bays.

There being no treaty, the "Jaseur" incident followed, in which, at 45 miles distant from the shore, American ships were warned off. Then came letters from Mr. Monroe complaining. Now came another letter from Lord Bathurst to Mr. Baker, and, of course, the Tribunal know that letter well. I am only directing attention to a particular aspect of it. It is on p. 64 of the British Case Appendix. He put two propositions in contrast with each other. He says:—

"You will take an early opportunity of assuring Mr. Monroe that, as, on the one hand, the British Government cannot acknowledge the right of the United States to use the British territory for the purpose connected with the fishery and that their fishing vessels will be excluded from the bays, harbours, rivers, creeks, and inlets of all His Majesty's possessions: so, on the other hand, the British Government does not pretend to interfere with the fishery in which the subjects of the United States may be engaged, either on the Grand Bank of Newfoundland, the Gulf of St. Lawrence, or other places in the sea,"

I cannot imagine words which make a clearer assertion of dominion inclusive of the right of fishing. There, he is picking out a bay as a bay, he is classifying it along with harbours, creeks and rivers. He is only saying what everybody had said up to that time with regard to their own bays, but he is making it perfectly clear that they will be excluded. I defy any one to find other terms for achieving that object, other language, than the words which are, in fact, there. He does not say: "I am going to allow them into the bay, but exclude

them 3 miles from the coast"; he does not mention coast, he drops coast altogether. He says: "I will not allow them in at all," and if that language is not sufficient to carry his intention, then no language is in any international document that can be drawn up. I would ask any one in this room to sit down and say in what words will you make clear that this nation is not to be entitled to use the bays of the other nation; and he would use just this very language. He would sit down and say: "Your fishing-vessels shall be excluded from the bays." He could not say anything more, he could not say anything clearer, and my difficulty is to argue such a point.

Now, we have done entirely with bays as parts of coasts, because we have done altogether with coasts. Did that letter reach the United States? There has been some doubt about it because Mr. Adams did not, in his letters, treat his conversation with Lord Bathurst, I think, adequately or accurately. Of course, he was a busy man with many things to look after, and I think nobody would blame him if he were not accurate in every respect. But, he was not accurate. However, his accuracy as to his conversation with Lord Bathurst is not now important, because we have a letter from Mr. Baker to Lord Castle-reagh in which he said that he had read these very paragraphs that I have just read to Mr. Monroe, the Secretary of State. Lord Bathurst writes this letter on the 7th September, 1815. It is No. 10 in the draft. We have the draft here. Mr. Baker writes to Lord Bathurst answering various letters, and among them No. 10 which related to the fisheries. The letter deals with various matters, the "Jaseur," the question as to whether vessels should be allowed to touch at St. Helena where Napoleon was then interned. Here is the original draft, it is No. 10, and on p. 3 of his reply<sup>a</sup> Mr. Baker goes on:—

"I next proceeded to fulfil the instructions on the subject of the fisheries contained in the Dispatch No. 10, by recapitulating to Mr. Monroe what had passed between us on that point during the summer, recalling to his memory the note which he had addressed to me respecting the conduct of His Majesty's Brig Jaseur, and my reply, and informing him that the language which I had held had been approved of by His Majesty's Government. In order to make the communication as clear and distinct as possible, I then read to him the two concluding paragraphs of Earl Bathurst's dispatch."

1132 The two concluding paragraphs said that fishing-vessels should be excluded from bays.

JUDGE GRAY: It is No. 16.

SIR W. ROBSON: It is only No. 16 in the Appendix.

JUDGE GRAY: It is not an official number?

SIR W. ROBSON: No, the draft itself is No. 10. At the top of the page, in the left hand corner of the draft, it is No. 10.

JUDGE GRAY: Is that the original?

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<sup>a</sup>Appendix (F), *infra*, p. 1395.



SIR W. ROBSON: That is the draft.

SIR CHARLES FITZPATRICK: What do you mean by saying that it is the draft?

SIR W. ROBSON: It is the draft retained by us from which the original was sent.

THE PRESIDENT: The original has been sent to Mr. Baker?

SIR W. ROBSON: Yes.

THE PRESIDENT: And this is the draft which has been retained in the Foreign Office?

SIR W. ROBSON: Yes, Sir, and we have handed in copies to the Tribunal. Here I have the original reply from Mr. Baker. I have, of course, the original of this letter from which I am reading, although I am reading a copy now.

THE PRESIDENT: That is the letter dated Washington, the 28th November, 1815?

SIR W. ROBSON: Yes. This is the important part. He refers to the fisheries and to Lord Bathurst's despatch and then he says: "I read to Mr. Monroe the two concluding paragraphs."

THE PRESIDENT: Will you have the kindness to have handed the originals to the counsel of the United States?

SIR W. ROBSON: Yes, they have been shown to the other side and have been considered by them. Now, this makes an end to what was rather a troublesome and unfortunate little controversy as to how much Mr. Adams said about it because now we have the matter made clear that Mr. Baker, when he got this letter from Lord Bathurst, did what, of course, one might have known, even without this letter, he would do. An important letter of that kind is generally communicated in express terms, and he went straight to Mr. Monroe, who was Secretary of State and who represented the United States in the matter, and he said: "Now, then, understand these are the instructions with which we begin to negotiate; you are to be kept out of bays; that makes clear what we mean and what we want. The way in which we are going to remedy the inconveniences we have suffered for the last twenty years is this that we are going to keep you out of bays altogether, because, when we let you in and give you landing rights, there are inconveniences and disturbances between the fishermen of the two countries." Thereafter, the whole of the negotiation up to the treaty of 1818 is on that footing. You cannot make anything stronger than that. The language of the subsequent letters cannot detract from the effect of this one single transaction. Of course, Mr. Adams, when he begins to write, does not quite accurately give the effect of his conversation with Lord Bathurst. Perhaps I may be wrong there. Perhaps Lord Bathurst may have been defective in what he told Mr. Adams; I do not think he would be, but it does not matter what he told Mr. Adams because the question

is what he told the Secretary of State at Washington. The Secretary of State at Washington was told exactly what Mr. Baker was told and what, I think, Mr. Adams would also be told, though he might not have carried it in his mind. Why did not Mr. Adams carry it in his mind? I think there is a very clear reason. He was not a concise letter writer; I wish he had been; he writes a very long letter and a very rhetorical letter—I do not say that in any unpleasant sense—but a letter dealing in a very argumentative way

1133 with the general question as to how far the treaty of 1783 had been abrogated. Why was he so anxious about it? Anybody who reads his letter—I am certainly not going to read it again—will say that he did not know what Great Britain was going to do about the bank fisheries. That is the very position as it was presented to him. He says: “We are told that Great Britain is going to assert her jurisdiction; she will let us go on fishing on the banks, but we have no treaty to that effect; the treaty of 1783 is gone; we have not got it renewed by the treaty of 1814, so it is gone;” and Mr. Adams thought that not merely this little bit of fishing on the south coast of Newfoundland, &c., was in doubt—that was not what he was thinking about—he was not thinking much about that, but he was alarmed as to where the right to the whole fishery would be if Great Britain asserted her old jurisdiction, a jurisdiction which had extended over the high seas. Great Britain is saying that she will not do that, but Mr. Adams does not trust Great Britain. He is thinking whether they will then be exercising their right of fishing on the banks at the mercy of and in the discretion of Great Britain. She might at any moment say: “I am going to assert my old jurisdiction.” He was writing with that in his mind. His mind was not particularly directed to bays, and so, when he purports to report the conversation, all he says is: “I asked him if he could, without inconvenience, state the substance of the answer that had been sent”—that is of the letter I have just read from Lord Bathurst to Mr. Baker. Mr. Adams writes:—

“I asked him if he could, without inconvenience, state the substance of the answer that had been sent. He said, certainly: it had been that as, on the one hand, Great Britain could not permit the vessels of the United States to fish within the creeks and close upon the shores of the British territories, so, on the other hand, it was by no means her intention to interrupt them in fishing anywhere in the open sea.”

That is very nearly the words of the letter, but we have just one important omission, the word “bays.” Lord Bathurst is supposed to be giving the effect of the letter. The word “bays” was certainly in the letter, but Mr. Adams does not report that Lord Bathurst mentioned bays. I think it is a failure of Mr. Adams’s memory, but I



may be wrong. It may have been a failure of Lord Bathurst's memory. It is only a conversation of a rather casual character, and I do not know who was mistaken, but it does not matter, because Mr. Adams, in writing to Mr. Monroe, refers him to the letter itself for the precise terms. It is on p. 66, at the last paragraph of the letter:—

“The answer which was so promptly sent to the complaint relative to the warning of the fishing vessels, by the captain of the *Jaseur*, will probably be communicated to you before you will receive this letter. You will see whether it is so precise, as to the limits within which they are determined to adhere to the exclusion of our fishing vessels, as Lord Bathurst's verbal statement of it to me, namely, to the extent of one marine league from their shores.”

There was no reference to bays in this letter; and he says that Great Britain was not going to assert jurisdiction beyond 1 marine league. But now he tells Mr. Monroe to go to the letter, and we know that if Mr. Monroe did not go to the letter, the letter went to him, and he knew not only that it contained the word “bays,” but that that was the very backbone of the whole thing.

From that moment onwards, I challenge my learned friend, Senator Root, to point to anything which shows that we ever receded from that position. Mr. Warren kept on talking about the 1 league. That has nothing to do with this point; it is a different point. It is a point that concerned Mr. Adams very much, because he was always afraid that we should go back upon our concession in 1783—I will not say concession—our acknowledgement in 1783 of the right of public fishing on the banks. The great war had ended in June 1815 by the Battle of Waterloo; we were a great maritime power, and I daresay he might fear that we were not disposed to use our victory very tenderly, and he was afraid that it might affect the fisheries on the banks. It was always that. Mr. Adams, everywhere throughout all these letters, has the bank fishery in mind, not those little trumpery bits of coast that they got afterwards in 1818. He had not thought much about them. As far as they were concerned, the whole of this controversy was brought to an end by that letter, I respectfully and humbly submit.

THE PRESIDENT: May I ask why this letter which we have communicated now was not printed in the Appendix?

SIR W. ROBSON: It was not found; it was not known. I do not think that anybody attached very much importance to it  
1134 until the argument compelled a re-search. We never knew of it and did not get it until this argument was developed here. Then a fresh search was made and this draft was discovered for the first time. I do not know that the documents are very carefully kept. There have been a great many documents that we would like to have got but could not find at all, documents which I cannot help thinking

must exist somewhere, but have been misplaced. A very large portion of this letter deals with other subjects.

THE PRESIDENT: There is only a very short paragraph alluding to this matter, whereas the letter itself is very long, and its reference to this subject might very well have been overlooked.

SIR W. ROBSON: This letter may have been seen, but the material passage may not have been discovered, because it is nearly all about the confinement of Napoleon on St. Helena. I am only conjecturing now, but it was probably put into some docket or lot of papers which concerned that rather than the fisheries, because the main portion of the letter is about preventing vessels from calling at St. Helena. It is just pointed out by my learned friend, Sir Robert Finlay, that our Appendix does show that, in fact Mr. Baker's letter was most probably shown because, as I have just shown, Mr. Adams says: "You will see from the letter itself what it says." Obviously, Lord Bathurst had said: "I have sent a letter to Mr. Baker, and I have told him to show it to Mr. Monroe." So that the matter was never in any substantial doubt, even on the documents we have got, but now it is put beyond any necessity for argument. Well, now, see the difference that that makes in Mr. Warren's argument. It is no longer any use for him to point to a passage here about maritime jurisdiction and say that means 1 league. That will not do any longer, because maritime jurisdiction means all the bays and the 1 league.

I need not go through Mr. Adams' mistake and deal with his account of the correspondence, because I think that may be treated, now, as settled. He does write to Lord Bathurst, and he does, in his letter to Lord Bathurst, purport to give an account of the conversation that they had between them on the 9th September, but it is a very, very imperfect account. He does not mention in that letter either bays or creeks. So that it is clearly not a very full account. Then, by the way, I cannot pass this point without drawing attention to an inaccuracy in the United States Argument, because they have made an inaccuracy even in advance of Mr. Adams'. Mr. Adams dropped out the word "bays," and spoke of "creeks and close upon the shores." But the United States dropped out the word "bays" and also the word "and," and treats Lord Bathurst's statement as if it had been "creeks close upon the shores." That makes a lot of difference. So that "bays, creeks and harbours and waters close upon the shores" are diminished in the United States Argument to "creeks close upon the shores." I will find that a little later. I can not put my finger on the reference at the moment.

I go on now with these letters. There are very few more.

Then comes the letter to which reference has been made, where Lord Bathurst complains of the way in which the American fisher-



men had conducted themselves in our bays, and gave that as his reason for the exclusion. Then came a proposal, which, however, came to nothing, in which Mr. Monroe writes to Mr. Adams that he understood Great Britain was disposed to regulate in concert with the United States the taking of fish on coasts, bays and creeks in Great Britain's dominions in North America; but that came to nothing. On the 11th August, 1816, going back to that little booklet again, on p. 16, comes another reference to the renunciation. Mr. Bagot is writing to Lord Castlereagh, on p. 15, and on p. 16 is this sentence. He states the propositions that he had made about fishing on the coast of Newfoundland, from Cape Ray to the Rameau Islands, and then he says, in the second paragraph on p. 16 [p. 1361 *infra*]:—

“From the manner in which Mr. Monroe received the second proposition, I entertain hopes that it will be accepted; and that I shall be able to annex to the acceptance an express abandonment of all pretensions to fish or dry on any other of the coasts of British North America—at all events, that I shall not be under the necessity of yielding the two propositions.”

and so on. Now, I may remind the Tribunal for a moment what happened at the end of the 1814 negotiations. At the end of the 1814 negotiations the American Commissioners said: “We have made no renunciation of our rights. We would not have it. Rather than make even an implied renunciation, we would not take a renunciation from Great Britain of her rights over the Mississippi.” They did not want to make this renunciation. Here we have Mr. Bagot saying: “I think I can get a renunciation. I think I can annex it as an express abandonment.” And then he says, in the very next letter, on p. 17 [p. 1361 *infra*], third paragraph:—

“I have as yet only offered the choice of one of the two proposed coasts; but I begin to suspect that Mr. Monroe is alarmed at the idea of accepting any proposal by which the pretension of right which has been made must be forever renounced. I shall certainly know the determination of the government in the course of this month.”

“Forever renounced.” Now, we see that that passage in the letter about the United States saying that they insist on the renunciation, while one does not want to treat harshly language of that kind, means this: They were negotiators, and they wanted to make out that they yielded as little as possible.

On the 27th of November, 1816, there is one more reference to this negotiation. This is from Mr. Bagot to Mr. Monroe, United States Case Appendix, p. 291, at the top of the page. In the very first line, this is what Mr. Bagot is telling Mr. Monroe:—

“and that all pretensions to fish or dry within the maritime limits, or on any other of the coasts of British North America, should be abandoned.”

**THE PRESIDENT:** Where is that?

**SIR W. ROBSON:** At the top of p. 291 of the United States Case Appendix. On p. 290, we have made our offer of this little piece of coast we are concerned with now, and we attach to that as a condition that "all pretensions to fish or dry within the maritime limits, or on any other of the coasts of British North America, should be abandoned."

**JUDGE GRAY:** May I ask, for my information: What do you suppose is meant by—

"or on any other of the coasts of British North America,"

after abandoning all pretensions to fish or dry within the maritime limits?

**SIR W. ROBSON:** It is a little puzzling why they should have troubled to add that; but it is rather in my favour.

**JUDGE GRAY:** It was not with reference to any significance one way or the other that I mentioned it. I did not understand why that was inserted.

**SIR W. ROBSON:** They say "maritime limits." What does that mean? Apparently it is being used there as though it were equivalent to maritime jurisdiction. That would include bays.

**JUDGE GRAY:** Sir Charles suggests that they enumerate the grant at the beginning of the paragraph, and then repeat the same language afterwards.

**SIR W. ROBSON:** Oh, yes. I think I had better read the whole paragraph:—

"It being the object of the American Government, that, in addition to the right of fishery, as declared by the first branch of the fourth article of the treaty of 1783 permanently to belong to the citizens of the United States, they should also enjoy the privilege of having an adequate accommodation, both in point of harbors and drying ground, on the unsettled coasts within the British sovereignty, I had the honor to propose to you that that part of the southern coast of Labrador which extends from Mount Joli, opposite the eastern end of the island of Anticosti, in the Gulf of St. Lawrence, to the bay and isles of Esquimaux, near the western entrance of the straits of Belleisle, should be allotted for this purpose,"—

Then follow some words that I certainly should have read—

"it being distinctly agreed"—

As a part of the contract—

"that the fishermen should confine themselves to the unsettled parts of the coast, and that all pretensions to fish or dry within the maritime limits, or on any other of the coasts of British North America, should be abandoned."

So that it is to be part of the contract. And the parties begin to negotiate with an agreement that this liberty over part of the terri-



tory shall be accompanied by an express renunciation of the remainder. And therefore the idea which was taken by my learned friends from the United States from the letter of Messrs. Rush and Gallatin is quite mistaken. Mr. Rush and Mr. Gallatin were, as I say, 1136 anxious to vindicate their sagacity. They are entitled to do that. They had had a hard task. They were making a treaty under the most difficult circumstances. If they had stuck to their point in 1814, when Napoleon was just returning from Elba, they would then have had a better position, and would have been in better circumstances for making their treaty with us. But we were very firm about this fishing right. We felt that it was not good, having these quarrels between fishermen in bays—that it was a bad thing, and we made up our minds that we would not have it continued. We said: “We are going to assert our territorial jurisdiction over our own bays, and we are going to keep you out.” America had allowed that thing to remain open. And then came 1816, when England had not an enemy left, and when she was with her triumphant navy still at its maximum power, her people accustomed to military pursuits, and her armaments in first-rate condition. It was not a good time for America then to try to improve her position. She could not. She not only could not improve her position; she could not keep it. And she had to give up everything except this little piece of the coast. She was afraid, as Mr. Adams shows, and as I have just pointed out, that she would even lose her bank fishing. But let it be said to the credit of English statesmen that, having recognised that as part of the international sea, they did not wish to go back on it, and they did not go back on it. Mr. Adams’ alarms were all ill-founded as far as the maritime limit was concerned. We were quite content to take any maritime limit, whether it was 3 miles or more. But as far as the bays were concerned we were inflexible. We said: “We will not have it, because it promotes war instead of promoting peace.” It was necessary to us to have an express renunciation, because Mr. Adams was so argumentative, and so persistent in his argument that he would have kept on to the end of time, or to the end of his time, and would have transmitted his argument to somebody else to keep on saying: “The treaty of 1783 still stands good. We have still got the right to fish in the English bays.” So we said: “We will not let you keep on saying that. We must have it agreed.” That is what Mr. Bagot says: “We must have it agreed that you give up your claim—that you expressly abandon it.” And that was why the renunciation clause came in, in 1818, although in 1814 the Americans do not only refuse it, but they would not have it in the most insidious or inferential form; they would not have it at all. Now they come to the point where they had to have it. Of course the negotiators tried to make the best of it. Sometimes when

a lawyer has made a settlement for his client he fights for all he is worth against the other side, and at last he has to turn round and explain to his client why he has made the settlement. He sometimes then has to lay a little extra stress on slightly different arguments, and to vindicate his own sagacity for giving something up. That was the position of Messrs. Rush and Gallatin. And so they said: "Look what we have got, anyhow. Our renunciation opens the seas as far as the 3-mile limit." They say: "We have got that." I am rather astonished to find them laying so much stress on that, because, according to the argument of the United States, in 1806 they had already got that. They say that in 1806 Great Britain had consented to a 3-mile limit; so they were not getting very much in 1818, when the renunciation clause included it.

There is still one more reference just to show that it was continued (British Case Appendix, p. 79). I had better give all the references on this renunciation point. Mr. Bagot is writing again to Mr. Monroe. I read from the end of the second paragraph on that page:—

"His Royal Highness will be willing that the citizens of the United States should have the full benefit of both of them,"—

That is, these concessions about the coastal fishing—

"and that, under the conditions already stated, they should be admitted to each of the shores which I have had the honour to point out."

The conditions already stated being exclusion from the bays—express renunciation. "You must consent to the renunciation, and you shall have the other advantages which have been mentioned."

Now I come to the conferences, and I can deal very shortly with this, I hope.

On the 28th July, 1818, we have the instructions to the United States Commissioners sent out by Mr. Adams (p. 304 of the United States Case Appendix) in which he authorises them to assent to this renunciation. It is under the heading "fisheries" to Messrs.

Gallatin and Rush, and I read from the second paragraph:—

1137 "The President authorizes you to agree to an article whereby the United States will desist from the liberty of fishing, and curing and drying fish, within the British jurisdiction *generally*, upon condition that it shall be secured as a permanent right, not liable to be impaired by any future war,"

It was a very important statement to put before this Tribunal that the United States had offered this renunciation. I do not wonder that it produced a very striking effect. Naturally, it would tend to make any judge construe such a clause very strictly indeed. He would say: "It is quite clear, when people are offering to renounce,



that they are not giving away more than they need. We must construe the clause strictly." But I think a different air is given to the clause when we see, not that they are offering to renounce, but that they are being compelled to renounce; and that they renounce most unwillingly. But the whole of the negotiation of these protocols is conducted on the footing that they have agreed to renounce. Otherwise, we would not have gone any further. Their own secretary had communicated to them their instructions, as to what they were authorised to do; so there never was any dispute about it. When the parties met, no dispute arose. As I shall show, the differences were on other points than this. We proposed one form of renunciation; they proposed another. As it happened, their form of renunciation, I think, was in terms a little more explicit than ours, and we took it; and nobody thought it mattered one way or another. Let me go through the protocols very shortly, of these conferences. There was nothing at the first or second conference; and then, at the third conference, on the 17th September, 1818, the United States submits their proposal. Article A, on p. 311 of the United States Case Appendix shows their clause as they submit it. I will read, afterwards, the one that we submitted:—

"The United States hereby renounce any liberty heretofore enjoyed or claimed by the inhabitants thereof to take, dry, or cure fish on or within three marine miles of any of the coasts, bays, creeks, and harbors of His Britannic Majesty's dominions in America not included within the above-mentioned limits: *Provided, however,* That the American fishermen shall be admitted to enter such bays and harbors for the purpose only of obtaining shelter, wood, water, and bait,"

"And bait." Now, before I pass that clause, I wish to draw attention to a few words in it. They use rather significant language there. First of all, they are quite clear in renouncing the right to enter the bays. They say: "We will keep 3 marine miles away from a bay." This was the first point, as they knew from Lord Bathurst's letter to Mr. Bagot that it was insisted on. Then they say:—

"*Provided, however,* That the American fishermen shall be admitted to enter such bays and harbors for the purpose only of obtaining shelter, wood, water, and bait,"

"Admitted to enter" is rather curious phraseology. I am dealing now with the suggestion that when bays were spoken of they were merely spoken of as indentations in the coast; that everybody was allowed to go into the bay, but that they were compelled to keep a certain distance from the shore. That is not the way in which the United States negotiators were looking at it. They had in their minds the closed bay—not the open bay into which they might enter, but where they might not fish, or might not land. They had in their

minds the closed bay. And they said: "We shall be admitted to come into it," like a man who knocks at the door and asks for admission, and it is opened, and he is admitted to enter; not like an open door, which he may pass through at any moment and without any request. So that they treated the bay as a whole, and it was entering the bay that they wanted, and they knew that it was entering the bay which was forbidden to them. It would have been very inappropriate language if they had been allowed to come in on the terms that they must keep 3 miles from the shore. That would not have been the proper language at all. But mark what they wanted to get in for. They wanted to come in for bait. Now, as to obtaining bait: There are two ways of obtaining bait; you may buy it or fish for it. Probably here they referred to fishing for it, because it was quite clear that we would not give them any commercial privileges. We were not going to do it, and we did not give them any. We would not give them any commercial privileges, so that what they contemplated there was fishing for that bait. The moment we saw that, we would not allow it. We said: "No. That will mean fishing inside our bays." It was suggested to me from the Tribunal that the only importance of keeping the United States out of the bay was to prevent them landing, and not to prevent them from fishing; but a minute examination of this clause reveals another motive. They would have had the right to fish if they had been entitled to 1138 come in and get bait; and so we put our clause forward. It appears on p. 312 of the United States Case Appendix, at the bottom of the page.

"His Britannic Majesty further agrees that the vessels of the United States, *bonâ fide* engaged in such fishery, shall have liberty to enter the bays and harbors of any of His Britannic Majesty's dominions in North America, for the purpose of shelter, or of repairing damages therein, and of purchasing wood and obtaining water, and for no other purpose;"

Then it goes on to say, below that:—

"It is further well understood that the liberty of taking, drying, and curing fish, granted in the preceding part of this article, shall not be construed to extend to any privilege of carrying on trade."

Those words "for no other purpose" were really as good a form of renunciation, in substance, as you could want; because it said: "You may come into these bays; you may have your shelter; but you shall not fish." That is what "no other purpose" means there: "You shall not fish." So that here you have a clause which is absolute and explicit, saying you shall not fish in any bay, which indents the coasts of the King's dominions. What more can be said than that? That is what we are claiming to-day. We are claiming to-day that those words meant what they said: That the bays are still our national



property, and that we have a right to say what the treaty says, that they shall not fish therein.

That was our renunciation clause, but of course it was not, perhaps, quite as good as theirs, and what they were differing about was not the form of that renunciation clause. Everybody agreed that there had to be a renunciation clause. What they were differing about was the extent of the fishing rights that were to be granted. We had cut them down.

In reading hurriedly a moment ago, I missed some words which are important: After saying that they shall enter the bays for the purpose of shelter, &c., and for no other purpose, it continues:—

“and all vessels so resorting to the said bays, and harbors shall be under such restrictions as may be necessary to prevent their taking, drying, or curing fish therein.”

So that it was not a question of their taking fish within 3 miles from the shore. It was a question of their taking fish in a bay;—making good what I said that in these negotiations in 1814 and up to 1818 the paramount word is the “bay,” just as in the earlier negotiations, up to 1783, the paramount word was “coast,” or “shore.” There you were including everything. Here you are definitely and specifically excluding from bays. And, in my humble opinion, there really is only one construction open on such words. They are not to fish *on* the bay, which means they are not to fish *in* the bay. They are not to enter it. And then, by going still further, for a particular purpose they may enter, but that purpose is strictly limited, and they may not avail themselves of any other advantage of their presence there.

THE PRESIDENT: If the British formula of the renunciation clause had been accepted, would there have been any strict disposition, any clear disposition concerning the extension of the maritime belt?

SIR W. ROBSON: Well, I think, Sir, it would not have affected the maritime belt at all, as far as bays are concerned.

THE PRESIDENT: No; not as far as bays are concerned.

SIR W. ROBSON: It did not fix the 3 miles.

THE PRESIDENT: It did not fix the 3 miles?

SIR W. ROBSON: No.

THE PRESIDENT: The great difference between the British formula and the American formula is that the American formula contains the 3-mile limit?

SIR W. ROBSON: Yes.

Now, let us look at that 3 miles and see whether that made any difference. The Americans have been contending here very strenuously that in 1806 Great Britain was demanding 3 miles as the limit of territorial jurisdiction, because in those days Great Britain wanted to have as little territorial sea as possible, because it was mistress of

the seas, and territorial jurisdiction over particular waters  
1139 meant that it could not go there with its fleets. And it was rather pushing for a 3-mile limit in 1806 for the coasts. There was nothing new in the willingness of Great Britain to accept provisionally a 3-mile limit. It did not accept it in 1806. No agreement was come to about it at all; but Great Britain was never averse to treat 3 miles as the limit, provided other nations would treat it as the limit also. And therefore, when America put into her renunciation clause that the maritime belt was to be 3 miles, Great Britain accepts. There is no discussion about it; there is no insistence on it.

THE PRESIDENT: On what question turned the discussion in 1806? It turned not on the question of fisheries, but on the question——

SIR W. ROBSON: On the question of impressment.

THE PRESIDENT: On the question of impressment; and at the time it was to the interest of Great Britain to have the maritime belt narrow?

SIR W. ROBSON: Yes. It is not unusual, and it would be idle to attempt to conceal the fact that occasionally these great nations—I do not think Great Britain stands alone—vary their arguments according to their case; and that they are sometimes putting forward in one part of the world a demand which is quite inconsistent with the demand they are making in another part of the world; but still, we must put up with these inconsistencies in Governments and in statesmen. But on this particular occasion, Lord Bathurst had already stated, and I have read that letter, and do not need to read it again, in 1815, that Great Britain was not unwilling to take 3 miles for the maritime belt. She was willing to take it; so that there is no dispute about that. In that letter, which you may remember I read, it was said that there must be reciprocity. She said: “We are quite willing to fix on 1 league as the maritime belt from the coast, provided America will do the same thing.” And Lord Bathurst called it the usual maritime jurisdiction; there is no doubt about it; the usual maritime jurisdiction, usually applied, namely, to the coast; but not so as to open up the bays. That was a totally different matter. So that, really, when America put in the 3-mile limit in our renunciation clause, she was only putting in what was practically agreed—not making any insistence, not getting any advantage. And when Messrs. Rush and Gallatin came to write home, they made a lot of it. They say: “We have got up to the 3-mile limit.” As I say, it would be most ungracious to criticise censoriously their justification of their own diplomacy. But one must not be misled by it. One must not carry their self-justification to the absurd length of supposing that they really wanted to give up this claim which had been the subject of so much negotiation and argument—the claim to the bays and harbours of British North America.



They did not want to. They knew perfectly well that the United States would endure almost any sacrifice rather than do it, but they had to do it. We demanded it. And that is the point of view from which the clause must be construed. Even before Dr. Lohman was kind enough to draw my attention to it, I had observed that that mistaken statement in the letter of Messrs. Rush and Gallatin was being accepted as a fact; but I thought perhaps it would not matter very much; because, of course, whether they insisted or not, still they had given up these bays, and we were entitled to have the clause construed according to its natural meaning. But it was not unnatural that, once it was accepted, it should have a great effect on the construction; and I respectfully submit, now, that as far as that important point is concerned, it is done with. The notion that the Americans were putting forward this renunciation as something good for them can no longer be insisted upon.

Now then, how does the case stand when that misconception is swept out of the way? It stands in this way: Up to 1782, America treats bays as national property. France does it; England does it; everybody in British North America does it. The property of the State carries with it, as a natural consequence, the right to regulate the fisheries in those bays; the right to exclude foreigners from fishing there. Therefore, when we come to give the Americans the right, in 1783, of fishing, we acknowledged their right in the high seas, and we presented them with the liberty of fishing in our bays. Having done that in 1783, we found that it was a mistake; that the inconveniences caused by it to us were serious; that the friction was endless, as I am quite sure it would be again if we had to make a similar concession; that it was impossible, when all bays are thrown open, to prevent fishermen from coming into the smaller bays (because it is there the greater danger is, although, of course, it is a serious danger in the larger bays), and insisting upon landing. And if we want to prevent them from landing, the only way is to say: "This bay is our territory. You shall not come in at all. 1140 You shall not fish here." And therefore we told them we would not negotiate unless they gave up the claim to fish within our bays. That is the plain way in which we put it. We said: "We will not negotiate." That was years before the treaty was made, in 1814; and then, afterwards, when negotiations are opened in 1815 and 1816, we kept on saying, and put it in the plainest terms we could find in the English language: "You are going to be kept out of our bays. Understand that is to be the condition before you sit down to take a pen in your hands to make a bargain at all." And the Americans say: "Good. We agree." And Mr. Monroe says to his negotiators: "You have our authority to assent to a clause in which we shall desist from claiming the right to fish in the bays."

The whole thing is as clear as daylight, until one applies the ingenuity of the hostile eye, and begins to say: "Well, now, can we not get rid of these plain words in some indirect way?"

I have dealt, now, with the point that, at all events, the word "bays" had an important signification, that it could not be treated as an idle word.

The point is practically finished, but I still will have to proceed a little further, and I am sure the Tribunal will forgive me if I give some attention to this, even at the cost of an extra hour or two. The people in Canada and Newfoundland are anxious about it, and I am sure an hour or two will not be grudged, in order that one may keep one's position perfectly clear about it. There is a further point which has to be dealt with, and can be dealt with with comparative brevity.

The United States do not put up the point with which I have been dealing. What they do is to say: "Oh, yes; we give effect to the word 'bays' and to that proviso which says we shall not enter bays; but we do it by constituting a particular kind of a bay, namely, a 6-mile bay, got by doubling the 3-mile limit." And already, if my argument is appreciated as far as it has gone, I have really answered that, in anticipation. I grant them the 3-mile limit. When I say I grant them the 3-mile limit, I mean I do it for the sake of the argument. It does not affect my argument a bit, because I have established that bays are separately dealt with. I have shown that bays are on an absolutely different footing, and everybody knew it, and everybody agreed. So that the step which the United States has to take, and which it cannot take, is, from the 3-mile limit to the 6-mile bay. By what right does it take that step? It has no right whatever to say that bays are to be so limited. The whole of Mr. Warren's argument never once suggested that in 1783 anybody had ever heard of a 6-mile bay. He did not suggest that anybody had ever heard of a 6-mile bay in 1818; not once. Why, therefore, should the word "bays" be carried out of its geographical sense, and limited in this purely artificial way? There is only one way by which it can be done. The United States say the words "of His Majesty's dominions" indicate that it is not the open geographical bay which is to be regarded, but the bay formed by the 3-mile limit. That is the argument to which I would like to address still a few words before I close.

The word "dominion" is that upon which they place reliance. I would like to ask what justification they have for that argument. The word "dominion," in the singular, may be said to be a geographical term, indicating a particular place under the dominion of a particular sovereign; or it may be an abstract term, used as synonymous with the word "control." You may say: "I have dominion



over such a person"; or you may say: "Such and such a country is one of the dominions of the King." Of course, when you are using it in the purely political sense, implying control, it has no plural at all. You cannot say: "I have control over this State, and I have 'controls' over two States." That will not make English. So that when you use the word in the plural, and speak of "dominions," you are using the word in its geographical sense; you are using the word as saying: "We will give the liberty to fish on the coast of that one of the King's dominions called Newfoundland"; or, you may say: "We will give liberty to fish upon all the King's dominions." It is only a compendious way of summing up a number of places with geographical names. It does not in the least degree import any special or peculiar or limited kind of sovereignty over territorial water, which is to be limited by a 3-mile boundary, or anything of that sort at all. The word as it is used is only appropriate in its geographical sense. The political sense of the word "dominion" is really only to be inferred at all when the word is used, as I have said, in the singular. I had better, perhaps, take the clause itself, in the treaty of 1783 first, because there the words occur:—

"The Inhabitants of the United States shall have liberty to take fish on the coasts, bays and creeks of all other of His Britannic Majesty's dominions in America."

Now, Mr. Warren, I think, does not contend that the restricted meaning he puts on the word "dominions" in the treaty of 1141 1818, meaning dominions limited strictly by the 3-mile limit, applies to the treaty of 1783. He can not contend that; because in 1783 there was no 3-mile limit at all. The parties could not be taken, in 1783, to have been contracting with reference to this imaginary kind of bay, the 6-mile bay, because they had not even got the basis for it in a 3-mile limit. And when one sees how the word "bays" is used there, it is used in its most general sense, "coasts, bays and creeks"; and then, afterwards, we come to the "unsettled bays, harbors and creeks." Again, there is no limitation on the word "bays," except merely in relation to the degree of settlement. How can anybody read into that clause any kind of limitation on bay? They cannot read any sort of limitation into it from international law, because international law had not got so far at that time. The only limitation they can read into it is that which is there expressed—the degree of settlement to which the particular bays have been subjected. Therefore I take it that we are entitled to assume that, in 1783, Mr. Warren's argument would not apply at all. I have dealt already with the authorities which show that full dominion was claimed over the ordinary geographical bay.

Then what happens between then and 1818, to make any difference? The only thing that can be suggested is that in 1806 there were cer-

tain negotiations. What was their effect? In 1806 the parties, as the learned President has pointed out, being engaged in negotiations on a totally different matter, impressments, had to consider the question of this limit, and they agreed, or rather provisionally agreed, because they came to no agreement, that it might be taken at 3 miles, if the other subjects of the agreement could be concluded. The other subjects of the agreement never came to any agreement; so the 3-mile matter dropped. But before the agreement was finally dropped, the 3 miles had been altered into 5.

And out of the proposals which never reached an agreement, one of which was that there should be a 5-mile limit, the United States now pretend that Great Britain had so completely bound itself to a 3-mile limit that that must be taken to be the common understanding of the parties in 1818, and that being assumed to be the common understanding of the parties, all you had to do was to double your 3 miles, and then you have got your 6-mile bay. I say, take it as the understanding of the parties as much as you like; but by what right do you double your 3 miles, and wherever the 3-mile lines meet at the entrance to a bay, by what right do you say that that bay is territorial and any larger bay is not? What is the idea that they are proceeding on. It is a very simple fallacy. They say: "Once you have got two territorial lines meeting at the entrance of the bay, the bay is land-locked." That is Mr. Warren's idea. Why? Is it to be supposed that vessels cannot get in because the two 3-mile lines meet? The two 3-mile lines make no difference whatever to the right of the vessel to enter. The whole of this theory that you can close a bay by showing the junction of the two 3-mile line disappears when you remember the right of innocent passage. Every vessel has a right to go within the 3 miles for innocent passage. So that you have not locked your bay by showing that the land at the entrance of the bay is all within the territory. That does not lock it at all. Your vessel still has the right to go through on its innocent passage; and then it gets inside and the bay opens up. I will take what I may call a bottle-necked bay—a narrow entrance, but opening out beyond the entrance. Then what happens to the vessel? It is more than 3 miles from the shore. And yet Mr. Warren would say you must not fish there. Why may not you, if it is more than 3 miles from the shore? Mr. Warren has nothing but his 3 miles to rely upon, when he has, as he imagines, closed the entrance to the bay. The vessel has, nevertheless, come in. He does not know what to do with her when he gets her into the middle of the bay. There she is far more than 3 miles from the shore. Is she entitled to fish or not? In answer to that, Mr. Warren says: "Well, I should say not." His theory being, apparently, that she had no right there at all. But she had a right to be there if she was entitled to fish anywhere outside 3 miles from



land. She has come through territorial waters in accordance with her right. So that the step that he takes of assuming that the entrance is locked because the territorial lines meet there is quite a fanciful supposition upon his part. Nobody ever imagined such a bay; no international lawyer has ever defined such a bay. You cannot take out the plain geographical word "bay" in this clause and substitute for it a thing which the parties themselves had never heard of and did not intend when they made their contract. The moment you leave the plain sense of the term you get into difficulties. The United States have made two or three attempts at devising some kind of bay which they think will enable them to meet the difficulties of their argument. First of all they dropped bays out altogether and said: "You simply follow the coast-line in its indentations and pay no attention to bays." They could not keep that argument up 1142 (that is the argument with which I have already been dealing at such length), because they could not explain the passages in the clause which relate to entering the bays. If you take what Mr. Ewart called the "fisherman's theory" and follow the sinuosities of the coast, you keep on entering the bays. But these clauses say in 1818 that you may not enter the bays—you shall only be admitted to enter for particular purposes. So the United States thought they must drop that theory. And they dropped that.

Next they took up the theory that I have just been dealing with, of the 6 miles between the headlands. Then that began to give them difficulty, because again, the bay might open out beyond the headlands, and they could not see them upon what principle they were going to deal with a vessel that finds itself there within the bay more than 3 miles from the shore and desirous of fishing.

And then at last, in the argument here, when every other alternative had been exhausted, they said: "Very well, we have got still a new kind of bay—another kind of bay which nobody has ever heard of, had not even been heard of in these Arguments, in the printed Arguments, namely, a bay at the end of a bay." That is not likely to be accepted as the thing that was meant by these parties. Because what we have got to determine here is not what international lawyers may consider as a convenient kind of bay to treat as territorial. That is not the point. The question is: What these parties meant? And what these parties, Great Britain and the United States, meant in 1818 was what they meant in 1793. They meant a bay such as Delaware Bay is and such as Chesapeake Bay is; they meant that and nothing else.

I have very little more to add, and perhaps, if the Tribunal will allow me to look over my notes, I may be able to condense my remarks so that, I think, I shall easily finish by to-morrow at 12 o'clock.

**THE PRESIDENT:** May I ask you one question: Were there in 1818 only these two great maps of North America, here designated as Mitchell's and Jefferys' maps; or were there also other maps?

**SIR W. ROBSON:** Well, Mitchell's map, I think was the best one, and probably the one used; and there was also Jefferys' book of maps. I do not know what other maps there were at the time.

**THE PRESIDENT:** Which of these maps has the greater authority—Mitchell's or Jefferys'?

**SIR W. ROBSON:** I think Mitchell's; yes, there are two or three references in the record to Mitchell's map. It was used undoubtedly in 1783, because the Commissioners say they used it. It was used also, I think, in 1806—I know there is another reference on the record as to its use at a later period. I do not think it is actually specified as having been used in 1818. But perhaps that would not be so important, because after all, they were only giving up in 1818 what they had got in 1783. That is our contention, and if the bays were specified in 1783 on Mitchell's map, those were the bays which were given up in 1818.

**THE PRESIDENT:** Then, Mr. Attorney-General, you had the kindness to promise us, I think it was on Friday, a written statement concerning the regulations of the fisheries, and the exercise of the fisheries.

**SIR W. ROBSON.** I am sorry they have not been delivered.

(After an informal colloquy as to the printing and delivery of the document referred)—

**THE PRESIDENT:** I am informed by Mr. Röell that the document has been printed and will be submitted to us to-morrow.

[Thereupon, at 4 o'clock P.M., the Tribunal adjourned until to-morrow, Tuesday, August 2, 1910, at 10 o'clock A. M.]

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THIRTY-FOURTH DAY: TUESDAY, AUGUST 2, 1910

The Tribunal met at 10 o'clock A. M.

**THE PRESIDENT:** Will you please continue, Mr. Attorney-General?

**THE ATTORNEY-GENERAL, SIR WILLIAM ROBSON:** I will move rapidly, Mr. President, through the few remaining points that I propose to make on bays, and I think I shall be able to deal very shortly with the two final Questions 6 and 7.

With regard to bays, there is one point upon which I desire to lay stress, and that is the controversy between France and the United States in 1823. It arose almost immediately after the making of this treaty. The matters which gave rise to the controversy took place in 1820, and the United States thereupon raised a contention which showed conclusively that they took the view of bays for which I now contend; that is to say, that they treated bays, all bays, big and little, as being places within which Great Britain had a right to give leave



to fish or to withhold leave to fish. I think this feature of the controversy to which I am about to draw attention may perhaps have escaped notice, because it is mixed up with another feature of the controversy, which, for my present purpose, is immaterial. After the treaty it appears that American vessels went to fish in the bays of the west coast of Newfoundland. They went to the three principal bays, to the Bay of Islands, Port-au-Port, which is a bottle-necked bay, although the entrance is more than 6 miles wide, and St. George's Bay. They went to these three bays, and they were at once ordered away by the French. The moment they were ordered off by the French they made a complaint to Great Britain. They did not, as it happened, tell Great Britain that they were fishing in bays, or else I should have very little to say for myself on Question 6; but they complained that they were fishing on the west coast, and had been turned off.

On looking at the affidavits on which they acted, it will be found that they were fishing in these three bays, and the United States, apparently not appreciating the importance of that circumstance, have themselves drawn attention to it in their Counter-Case, on p. 89. They say, on p. 89 of the United States Counter-Case:—

“The controversy in regard to the French claim in 1823 grew out of an attempt by France to exclude American fishing vessels from the west coast of Newfoundland.

“Under the liberty of fishing established on this coast by the treaty of 1818, the American fishermen at once began to engage in fishing in the bays, creeks, and harbors, as well as in all the other waters of the west coast of Newfoundland; and having found that the fishing there was of great importance,”—

I must say I cannot quite accept that as an accurate statement of the fact; but still, for the present purpose, I need not draw attention to it—

“as it could ‘be commenced there several weeks earlier than on any other part of the coast, and the season is so short, at longest, as barely to give time sufficient for making the voyage in the best manner,’ they returned there annually in considerable numbers. It appears, however, that in the years 1820 and 1821, a French war vessel undertook to interrupt this practice by ordering them away and forbidding them to fish on that coast. In the latter part of May, 1820, the American schooner *Aretas*, and other vessels in company with her, were ordered out of St. George's Bay by the commander of a French naval vessel and forbidden to fish ‘at any harbor or island’ on the west coast of Newfoundland; and in the following year the same vessel was ordered out of the Bay of Port-au-Port on that coast, and threatened with seizure if attempting again ‘to catch fish anywhere on that coast.’ So also, in 1821, the American schooners *Betsy* and *John Quincy Adams* were ordered out of the Bay of Port-au-Port by an officer of the French warship, and forbidden to fish ‘there on anywhere on that coast.’ Again, in the

same year, the American fishing schooner *Bird* together with thirty other American fishing vessels, while fishing at the Bay of Islands about the first of June, were boarded by a French naval officer and threatened with seizure if again found 'fishing there or any place on the shore of Newfoundland between Cape Ray and the Carpoon (Quirpon) Islands.' "

Of course the dispute was not confined to bays. As between France and the United States it did not turn on bays, and that is one reason, I say, this feature of the dispute has not received sufficient attention. France said: "You have no right to be anywhere on this coast." And that was what the United States reported to England. As far as Great Britain was concerned, it treated the dispute, from beginning to end, as dispute about the right to fish anywhere on the coast. It did not distinguish between coast and bay, because it did not know where the vessels had been fishing. But it is very important for our purpose to distinguish.

1144 The affidavits that were made on this point by the United States seamen, appear in the United States Counter-Case Appendix, at p. 105. I need not read them as I have given their effect. I only give the reference, pp. 105 and 106, because it shows where each vessel was fishing. I do not read them because I want to save time, and they do not add to the statement that I have given; but I am desirous that the Tribunal should have the reference.

See what that means. Perhaps I should pursue the facts a little further, before I go on with the Argument. When the United States vessels were put out of these bays—the three principal bays on the treaty coast—the Government of the United States made complaint to Great Britain. In the British Case Appendix from pp. 101 to 113, these complaints appear; and again I am going to deal with them shortly. I will just read one or two passages, in the letters of Mr. Adams and Mr. Gallatin. Mr. Gallatin was then the Minister at Paris, and that is very important, because he was one of the signatories to the treaty; so that when he was talking about the meaning of the treaty, he knew what he was about. He had signed it; and the meaning that he and Mr. Rush put upon it, is very important; because he and Mr. Rush and Mr. Adams are the very three that were concerned in the making and signing of the treaty of 1818; and the very three who are now conducting this correspondence. What they do is to turn round on England and say: "You gave us the right to fish here"—meaning, of course, in these very bays; not merely on the coast at large—"You gave us the right to fish in these very bays; and we have been turned out of these bays, and you must pay us. You have given us a right which apparently you cannot make good, because the French will not let us fish there; and therefore we insist that you shall give us compensation."



SIR CHARLES FITZPATRICK: Were they within the 3-mile limit?

SIR W. ROBSON: It could not be said that they were, when you look at the affidavits. They do not say they were in the 3-mile limit, and when they talk of being ordered out of the bay, out of St. George's Bay, for instance, they do not say a word about the 3-mile limit. They say "St. George's Bay." I think as many as thirty vessels were ordered out. The probability is that they were fishing generally in the bay. The United States claimed that the vessels were fishing there under a title derived from us. Their argument in effect meant this: "These bays are within your jurisdiction. You have given us the right to fish there. It turns out that we are not allowed to fish there, because France claims an exclusive right; and you must either establish our right as against France or give us monetary compensation."

If there was nothing else in the case, it seems to me that this would settle the meaning of the treaty, because it is the construction of the treaty by the men who signed the treaty. They know that these vessels were fishing in the bays. The affidavits do not say, and I do not believe it was the fact, that they were fishing within the 3-mile limit. Now, mark the way in which it is treated by Mr. Adams. He argues that France had not an exclusive right. The order to go out applied to the whole bay; so that wherever they were found, they were told: "You cannot fish in this bay, as a whole." And they were ordered to go out of it completely, into the open sea.

Among the letters which are here, which I hope the Tribunal will read on this point—I do not think I should be justified, as I am trying to finish within a limit of time, in going over them all—one need only mention a letter like that from Mr. Gallatin to Viscount de Chateaubriand, on p. 105 of the British Case Appendix, where he draws attention to the proceedings of the commanders of French armed vessels in driving American fishermen from—

"a coast the sovereignty of which belongs to another Power, and over which France has no jurisdiction,"

And he complains of that as an aggression. Then, Mr. Adams, at p. 107 of the British Case Appendix, writes to Mr. Rush, who was then the American envoy in London, and says that Great Britain has an interest in this question, because Great Britain has exclusive sovereignty of that coast, and he goes on to tell Mr. Rush to put forward this claim to the British Government; and, at the end of the third paragraph in the letter he tells Mr. Rush to call on the British Government—

"to maintain at once the faith of their treaty with us and the efficacy of their own territorial jurisdiction, violated by the exercise of force against the fishing vessels of the United States engaged in their lawful occupation under its protection."

1145 Then he says, in an extract from his diary given on p. 108 of the British Case Appendix:—

“Great Britain was bound to maintain her own jurisdiction. And if she had conceded to us a right which she had already granted as an exclusive possession to France, she must indemnify us for it.”

Great Britain, finding that the dispute turned on the treaty of 1778 between France and the United States, referred the United States to France; and, ultimately, the United States decided they would not pursue that matter any further “for the present.” On p. 113 will be found the letter from the British Minister at Washington to Mr. Canning, saying that he had ascertained a few days since (that is in 1825, more than two years after the controversy began) from the American Secretary of State that there was no intention on the part of the President to pursue the negotiations any further “for the present.”

So here you have got American vessels ordered, not out of the 3-mile limit, but out of the bays. You have the United States thereupon saying to England: “You must pay us, because you gave us the privilege of fishing in these bays, and we are not allowed even to enter them.” And England says: “We are not going to pay you. You must maintain your own rights, if, having regard to your treaty of 1778, you think you have got them;” and ultimately the matter dropped. But what is the construction or interpretation by the United States of the treaty they have just signed; what is the interpretation placed upon it by Mr. Rush, Mr. Gallatin, and Mr. Adams? They all of them in effect say: “The word ‘bays’ which was used in the treaty means all the bays and the whole of each bay. We, the United States, are entitled to fish there, not because it is open sea—if it were open sea, we should not turn round and ask Great Britain for compensation because we had been turned out—we are entitled to fish there because it is British jurisdiction, and exclusively British jurisdiction.” In one of these very letters Mr. Adams refers to it as purely British waters.

There is a case of admission which is conclusive. For instance, when I come to Question 6, I shall have to deal with some very awkward admissions, but I do not think there is a single admission so awkward as this on Question 5 for the United States. There is not a point against me on that question which is stronger than or so strong as this. I venture to say, that if this question was put before any municipal tribunal, they would say: “The United States Commissioners who made the treaty have put this construction on it. They have decided the question for us. They have said that they considered the bays were included within the grant, not merely 3 miles from the coast of the bays, but the whole of the bays. They have said that these bays were not to be treated as open sea. They have



said they belonged to Great Britain, and that Great Britain had granted them a title which she was bound to maintain.

That is the whole case. Of course, these were bays on the treaty coast. The renunciation clause refers to the bays on what are called the non-treaty coasts. But that makes no difference, as the word "bay" has the same meaning throughout the article. So that it is not open to my learned friends on the other side to say: "Oh, these are treaty coast bays, and we got them under the treaty." That only means that the word "bay" under the treaty carried the signification for which I contend.

I shall just draw very brief attention to the contention of Mr. Warren as to the ground on which he claimed an exception for Delaware Bay. I dealt with that yesterday, pointing out that Mr. Warren had planted himself in a vicious circle, saying that the United States had Delaware Bay because we had acquiesced. And then it turned out that our acquiescence was founded upon his argument, or rather upon the United States argument, that they were entitled to that bay by reason of its conformation and the then state of international law in British North America.

But I desire now to examine the grounds upon which he claimed Delaware Bay as an exception, because they are grounds which completely dispose of all his case. This is what he says, on p. 4334 [p. 724 *supra*]:—

"No nation had jurisdiction over any bay, gulf, or other extension of the sea into its territory exceeding twice the width of its territorial zone, except"—

Now comes the exception:—

"by force of an affirmative international assertion by that nation of such a right over that particular body of water."

1146 And these are the grounds which he thinks give a nation its bays:—

"an affirmative international assertion by that nation of such a right over that particular body of water based upon the existence and averment of facts constituting good reasons for allowing the claim in that particular case."

So that, apparently, if any nation can allege what it considers good reason for allowing a claim in a particular case, it has a right to the bay. That is rather different to the twice three makes six rule; rather different to the territorial zone. That appears to vanish, now. All that is wanted is:

"An affirmative international assertion . . . based upon the existence and averment of facts constituting good reasons for allowing the claim in that particular case: such, for example, as the relation between the extent of the penetration of the water inland and its width."

The 3-mile zone is all gone, now. Here is Mr. Warren, for the United States, alleging that you may get a bay and keep a bay, according to the—

“relation between the extent of the penetration of the water inland and its width.”

He is thinking of Delaware. But just let him apply the same principle to Chaleur, and his own rule gives us Chaleur.

And mark his other reasons. They are still more genral and comprehensive:—

“The degree of usefulness for municipal purposes.”

There is an extraordinary ground—about as far remote from the territorial zone theory as east is from the west—

“the degree of usefulness for municipal purposes.”

Again, I suppose, he was thinking how useful it is to have the fishing in Delaware Bay all to yourself. That is the degree of usefulness in Delaware Bay. But how is the degree of usefulness in Delaware Bay greater, by the value of one single herring, than it is in Chaleur Bay? It is just as useful to the people who live on the banks of Chaleur Bay that they should have their own fishing as it is to the people who live in the State of Delaware.

Here is another test proposed by Mr. Warren:—

“the population and use of the shores.”

I never heard of such a test. Mr. Warren, when he sets out to find grounds for keeping a bay, leaves Grotius, Galiani, Azuni, and the rest all behind him. They never thought of proposing as a reason for keeping a bay that you should have regard to the population on the shores, or the use of the shores. Mr. Warren says these are excellent reasons for keeping a bay. And he goes on:—

“the necessity of exclusive use as a means of defence to the vital interests of the country.”

That is my case. Where will you get a more important case for the necessity of exclusive jurisdiction, so far as defence is concerned, than the Bay of Chaleur? Just imagine, in time of peace, foreign warships being authorised to enter that bay, and to command, it may be, the whole of the adjacent territory on the outbreak of war. Mr. Warren says he could never allow that in the case of Delaware Bay; and he is right. He could not allow it in the case of Delaware; but he is here laying down general rules; he does not profess to be deciding it for Delaware alone, but he is laying down general rules upon which a nation may keep its bays; and every one of his general rules applies to every one of our bays.

He goes on:—

“the vital interests of the country, and ”——



Here is another important reason—

“the ability of the nation to exercise sufficient force to defend an exclusive use.”

That is a rule rather hard upon the smaller States. Apparently if they have a bay which comes into their territory, but they have not got an immense navy, that is a reason why they should not be allowed to keep their bay, according to Mr. Warren. According to my humble submission, instead of being a reason against their keeping the bay, it is a very strong reason in favour of their  
1147 keeping the bay. A weak nation and a small nation needs to guard its means of defence far more than a great nation with a huge navy. But still, if that test is going to be applied to bays, it ought to give Great Britain a reasonable quantity. If it comes to ability to defend maritime waters as territorial, I think Great Britain may say that it is not in a worse position than any other nation in the world.

This is how Mr. Warren winds up:—

“and that the grounds thus alleged must commend themselves to the nations of the world so as to lead to acquiescence in the claim.”

Does he mean to say that if he got a judgment in this case, which affirmed that bays above the extent of the 3-mile zone were all open sea, thereupon he would calmly acquiesce in the opinion of the nations of the world about Chesapeake and Delaware? Because they would all say to him: “Now, Mr. Warren, the International Tribunal has decided in your favour. No longer is any nation to claim jurisdiction or exclusive rights of fishing over bays which are greater than 6 miles between the headlands. So that the acquiescence which hitherto States have given in your occupancy of Delaware Bay goes. It was mistaken. It was founded on a misapprehension of the international right.” Does he pretend that the United States would instantly acquiesce? Why, there is not a man in Europe or the United States who does not know that the United States would defend those bays as much as it would defend any county in any one of its States. He knows that perfectly well. And why would it defend them? Because it says: “We consider they are in our territory, and that is our business. We have asserted it, and we mean to keep them.” That would be the answer of the United States. And the same answer applies to these other bays which we have been asserting are our own. We have acquiescence from the United States in our occupation of these bays, far more explicit and far more frequent than he has any acquiescence in Delaware Bay. As I pointed out yesterday, the very first important international act that the United States did as a nation was, by the treaty of 1778, to affirm as between itself and France the territoriality of every bay. The

very first thing it did was to put these embayed waters upon the footing of ordinary landed territory. That was its acquiescence in the principle of the territorial bay, and from that it ought not now to be allowed to recede.

I do not think I need go through the other passages of Mr. Warren's speech. I have dealt already with his observations about the authorities. He said that there were no authorities in favour of our proposition. Well, I have dealt with that. I have been through the authorities down to 1818, and showed that every leading authority laid down the principle for which I am now contending. And therefore I need not take up time by repeating or recalling that part of my argument.

Another important point, a most important point as between the parties, is a transaction to which my friend Sir Robert Finlay referred so fully that I need not do more than simply recall it to the mind of the Tribunal as part of this argument.

This dispute about bays began, as we know, in the middle of the last century, and continued with intermissions caused by the existence of reciprocity treaties from time to time. And then, in 1888, the last reciprocity treaty of 1871 having expired, it was thought by the parties that they really ought to settle this question of bays by common agreement. Of course, the Chamberlain-Bayard treaty came to nothing; but it is very useful, as affording an illustration of what the parties thought when they sat down to make a fresh agreement upon this subject. Did it occur to anybody in 1888 to say: "Every bay except a 6-mile bay is open sea"? Such a doctrine would have been laughed at; and when the two Governments tried to come to a reasonable agreement they did so upon practical, moderate, sensible lines. They did not give Great Britain all that it was entitled to, because the matter was not being decided strictly according to legal rights. If the parties had been proceeding according to a strict construction of the treaty, I submit that they could not have avoided giving Great Britain all its bays; but they were trying to settle the matter upon reasonable lines of compromise. It was merely a compromise, and what was the effect of it? Embayed waters within headlands 10 miles distant from each other were all to be treated as territorial; and with regard to the larger bays, each was dealt with on its merits. There is always a difficulty in deciding the exact limits of a bay. When you have said that you are going to give a particular bay, or any number of bays, to a certain state, all you have done is something like what you do when you say, in a treaty of peace: "We will give you such and such a province." The boundaries of the province have to be delimited very carefully. And so, when you have said: "We will give you bays," the bays have to be delimited. If, for instance, this Tribunal thought fit, as I humbly and



1148 respectfully submit it should, to give Great Britain all the bays in the words of the treaty, it would still be useful and necessary that the parties should agree upon the headlands in each case. Now, what is the action that was taken for the principal bays under the Chamberlain-Bayard proposed treaty? I am not going into this in detail, because, as I say, Sir Robert Finlay went into it so thoroughly, but they delimited the principal bays, and I merely recall to the mind of the Tribunal the distance between the headlands in some of the cases. In some cases the distance was 16 miles,  $14\frac{1}{2}$  miles, 17 miles,  $17\frac{1}{2}$  miles,  $10\frac{1}{2}$  miles plus  $10\frac{3}{4}$  miles, making over 21 miles; and they went on through all these bays and fixed the particular delimitations, up to 17 and 20 miles. It was a most unfortunate thing that the Senate, for reasons which did not concern bays, and probably did not concern fishing, refused to allow this carefully considered document, framed by consultation between responsible statesmen of both countries, to become effective, although these men had thought this matter out with the greatest care and moderation and good sense. Still, there you find the two Governments going up to 20 miles as a reasonable limit between headlands. On what ground do they do that? Upon the grounds stated so fully and precisely by Mr. Warren. When Mr. Warren is justifying Delaware Bay, he has put my argument in favour of my point better than I have put it myself. That might be expected. But he has also gone much farther than I have gone, which might not be expected. He has stated that among the things he would take into account are not merely measurements between headlands, but population, use of the shores, all kinds of considerations; and he says they must be such reasons as commend themselves to the common sense of nations. Well, now, Mr. Chamberlain and Mr. Bayard knew or thought that they were acting in a way which would commend itself to the common sense of nations. Of course there might be political reasons, as in that case there were, which induced a particular legislative body to throw the treaty aside; but the common sense of those distinguished statesmen showed that you might take Mr. Warren's grounds and apply them to bays which went three times as far as he is willing to go now.

So that, on this question of bays, I submit with confidence that my case is proved almost beyond dispute. I should not say beyond dispute, because we can dispute anything, for any length of time. But they are certainly proved to the satisfaction of any reasonable man. If the Tribunal will just cast its mind back over the range of my argument, it will be seen that I began to point out that centuries ago bays were expressly claimed to be treated as part of the land; that everybody admitted the claim; that everybody acted upon it; that treaties were made on the faith of it; that bays were put into a category by themselves, as distinct from the general coast line; that when

the parties came to this treaty, they used the most express words they could find in the language to make that clear; that when the treaty had been made, the United States at once proceeded to act upon our construction of it, so far as bays on the western coast of Newfoundland were concerned; and that later on, in those parts of the controversy dealt with by Mr. Ewart, where the statesmen first came into collision, Mr. Everett took a line similar to the argument which I am urging. I am not going into that later controversy. I do not think I need go into it. But I ask the Tribunal to bear this in mind: Any reason which would deprive Great Britain of the "bays" which are referred to in this treaty is a reason which would apply to bays generally, and therefore is a reason which would deprive the United States of the bays it claims.

Then there is one point which I think, again, has not received the attention it deserves, although it has been mentioned in the course of the argument. It is that before the treaty Great Britain passed various statutes showing that it was exercising complete jurisdiction over the bay of the Miramichi and other bays as over its own territory; so that if it were to lose these bays now, it would really be deprived of property for which, for over a hundred years, it has been legislating as its own. The statutes are set out in the British Case Appendix at p. 597 and some of the succeeding pages. They go right away back to 1799, and I will only just mention them generally. Perhaps I had better give the references, for the facility of the Tribunal in finding them, when afterwards it comes to consider the point: Page 597, British Case Appendix, 1799, 39 Geo. III, Chapter 5, sec. 1, deals with the bay and River Miramichi and its branches:—

"No net whatever to be set off any part of Fox Island, . . . or any other Island, Middle Ground or Shoal in the said Bay,"—  
dealing with the whole bay—

"excepting as is hereinafter permitted."

1149 So that there is legislation for the bay as a whole, saying:

"You may only put your nets in this, that, and the other part of it."

Then section 2 is to the same effect. And then, on p. 603 of the British Case Appendix, in the year 1810, is the statute of 50 George III, chapter 5, which is a very important one. It is for erecting beacons and buoys in the bays and harbours of Miramichi, Buctouche, Richibucto, and Cocagne; and it says, in section 2:—

"That so soon as the said beacons or buoys shall be erected, and the same certified to the satisfaction of the Commissioners, or major part of them, to be appointed in manner herein before mentioned, there be and hereby is granted unto His Majesty, his heirs and successors, for defraying such expenses as may be incurred in erecting, repairing, or replacing such beacons or buoys, that is to say, on all vessels entering the bay,"—



the following taxes. So that you could not enter the bay or any part of it without paying this tax. You could not have a better assertion of territorial property than that.

And then, on p. 607, in 1823, the statute of 4 George IV, chapter 23, section 2, is again to the same effect. It says:—

“That if any person or persons from and after the passing of this Act shall erect or set up any . . . nets, in the River or Bay of Miramichi, or its branches, except as is provided for in the said Act,” &c.

Then it is the same way with regard to Chaleur Bay. We have legislated for it just as we might for Ottawa, Montreal, or Quebec. We have legislated for it as far back as in 1785. Take the British Case Appendix, p. 554:—

“Whereas it will be for the general benefit of our subjects carrying on the fishery in the Bay of Chaleur, in our province of Quebec,” &c.

That means that this is part of our territory; and they proceed to regulate the fishery in the whole of that bay, as if it were their own. And now they are to be told that they had no right to do it at all, and that foreign ships may sail right up into the Bay of Chaleur.

Then, the same in the year 1788, in the same Province of Quebec.

Then came later the case which has been so fully dealt with, the Conception Bay case, when the question of that bay came up before the English Privy Council, and one of our greatest judges decided that Conception Bay was territory of Great Britain as much, as I said yesterday, as any meadow in the land.

Then, it is pointed out to me, that in 1851 we divided the Bay of Chaleur between two provinces. But really I am obliged to check the industry of my learned friends, because I might go on for ever giving instances, all of them equally strong and each of them equally conclusive if fairly considered.

A question was asked me yesterday about Mitchell's map; and we have looked up references to this map in Moore's “International Arbitrations.” It is a well-known book published at Washington, and has been referred to in the course of this arbitration. There I find the following references to Mitchell's map. A note on p. 6 says:—

“In a letter to Edmond Randolph, Secretary of State, . . . Mr. Jay, referring to the fifth article, observed that in the discussions before the commissioners, the old French claims might be revived, and that the United States must adhere to Mitchell's map.”

That is the map which was used in 1783; but we have no direct reference showing that it was used in 1818. We have its use affirmed in 1783, 1794, 1823, and 1797, and various other instances, but we have not got it brought exactly to 1818. But it was a very authoritative map, and I cannot doubt but that it was used in every one of those negotiations.

Then the next reference, p. 18, where President Adams is examined on oath by a committee in reference to some treaty:—

“John Adams, President of the United States of America, appeared before the Board and (being sworn) was examined as a witness to the following Interrogatories, viz: Interrogatories by the Agent of the United States.

“1st. What Plan or Plans, Map or Maps, were before the Commissioners, who formed the Treaty of Peace in 1783, between His Britannic Majesty and the United States of America?

“*Answer.* ‘Mitchell’s map was the only map or plan, which was used by the Commissioners at their public Conferences, though other maps were occasionally consulted by the American Commissioners at their lodgings.’”

I remember now, this evidence was given, I think, in a boundary arbitration which was held before the King of the Netherlands, in 1829—

1150 THE PRESIDENT: That is also a quotation from Moore?

SIR W. ROBSON: They are all from Moore that I am giving now; that is on p. 18, and Mr. Adams says later on p. 19:—

“No other plan than Mitchell’s map that I recollect.”  
was used.

“Documents from the public offices in England were brought over and laid before is;”

And so on. But he says that Mitchell’s map was the one they used. Again, Moore on p. 89 says:—

“The commissioners under Article V of the Treaty of Ghent——”  
That was 1814; I should have given that—

“were unable to agree even on a general topographical map of the territory in dispute. The convention supplied this defect. It provided that Mitchell’s map, by which the framers of the treaty of 1783 were ‘acknowledged to have regulated their joint and official proceedings,’ and a map marked A, which had been agreed on as a delineation of the water courses and of the disputed boundary lines, should be annexed to the statements of the contracting parties, and should be the only maps to be considered as evidence, mutually acknowledged by the contracting parties, of the topography of the country.”

The article which is there referred to is article 4 of the treaty of 1827 which I have before me—that was the treaty which was referred to the arbitrament of the King of the Netherlands as to the boundaries. This is from “Treaties of the United States and Foreign Powers,” published in 1873, p. 368—it does not give the number of the volume, but the article is:—

“The map called Mitchell’s map by which the framers of the Treaty of 1783 are acknowledged to have regulated their joint and official proceedings . . . agreed upon by contracting parties.”



And so on. The Tribunal has seen Mitchell's map, with those great lines marked on it, showing the 90-mile zone, and of course I do not need to refer to that again. There was plenty of material at the time upon which the parties could agree as to bays if they liked. But it does not matter to my argument whether a map was used or not. If the parties choose to agree without a map the agreement is equally good. If without any map whatever they choose to sit down and say: "Each country shall keep its own bays, just like counties within its own territory, and have complete control and authority over them and be at liberty to grant rights over them or to withhold rights, to take or to renounce," that is quite good enough, although nobody takes the trouble to look at a map at all.

I now refer to a United States work, "International Law Digest," which again is by Moore, the author of the volume on "International Arbitration," who quotes in vol. i, p. 705, under the heading "the Marginal Sea," what Mr. Buchanan, Secretary of State, wrote to Mr. Jordan on the 23rd January, 1849. It is a State Paper, of course:—

"The exclusive jurisdiction of a nation extends to the ports, harbors, bays, mouths of rivers, and adjacent parts of sea inclosed by headlands; and, also, to the distance of a marine league, or as far as a cannon-shot will reach from the shore along all its coasts."

Mr. Buchanan was Secretary of State then, and afterwards President. His name is one with which on this side of the Atlantic we are familiar as that of a great American.

There he is laying down my principle in a form which suits me perfectly, because he is there not merely saying we have got the "bays," but he is pointing out that each nation has the "bays," and he draws the distinction which I have been insisting upon, I am afraid at such nauseating length—the distinction between territorial jurisdiction as comprising the bays, and the 3-mile limit as being something quite additional, and quite separate, and applying to something other than "bays."

There he says it has jurisdiction over the bays, and also as if it was something totally different, to the distance of 1 sea league along the shore, showing that those are the two elements of jurisdiction—"bay" first; "marine league along the shore" next.

Well, now, my friend Sir Robert Finlay opened—he did not wait to have it brought against him—but he opened as part of his case the fact that there have been in some measure contradictions and diversities and inconsistencies on the part of British statesmen in regard to "bays" generally.

There have, I venture to say, been no inconsistencies—none—with regard to "bays" in this part of the world. They stand on the footing of the treaty, and Great Britain has always maintained that whatever may be the international law, whatever may be the case

as to "bays" in other parts of the world, the "bays" of British North America were in a different class, a class by themselves. They were decided by these treaties at all events as between Great Britain and the United States. Whatever may be international law, those two nations have bound themselves in respect of "bays" in British North America. There has been no inconsistency there. But the speech of my noble friend Lord Fitzmaurice was cited, in which he said that there was a unanimity of opinion (I think he was going a little farther there than was strictly accurate)—a unanimity of opinion about the bays with which he was dealing, that is, bays in Europe. He was dealing at that time with the Moray Firth case in Scotland. That might be. I am not saying it was so, but even if it had been so, it would not have affected this argument. He was not dealing with British North America. British North America was not in his mind at the time. He was dealing with the Moray Firth, and he made this statement with regard to European bays, and "bays" under the general international law, not affected by particular treaties; and he made a very wide statement. But I notice that after it was made there was some qualification in a debate about a year later. He refers to his former speech and he says:—

"As Lord Salisbury's name has been so frequently invoked" (Parliamentary Debate, Wednesday, 11th November, 1908) "I cannot do better than quote his words in the debate of 6th May, 1895, in regard to the three-mile limit and to those particular places where what may be called the facts of nature have made difficulties in applying that hard and fast principle and caused some slight modification in practice. Lord Salisbury said"—

And here follows the quotation, which, of course, Lord Fitzmaurice is giving by way of approval, or with his approval:—

"'As long as the coast is open there is no doubt that three miles is the limit of territorial waters, but when the coast is folded, and doubled, as it is in that part of Scotland,'"—

Still only dealing with that, and not with British North America—

"'there comes in a different set of conditions which belong to diplomatic law; and I may say it is an unsettled question in international law how far those territorial waters extend in such cases. . . . Where the coast is not straight but makes an angle, there the limit of the territorial waters is not so fixed.'"

And then Lord Fitzmaurice adds:—

"It is precisely because many of the waters on the coast of Scotland are folded in that many of these difficulties arise."

That is dealing with general international law.

My position here is that in this particular controversy we are not dealing with general international law; we are dealing with the law of the two parties—that which they made a law for themselves by



their contract; and I dare say, in future controversies about bays, if anybody is industrious enough to do what I am quite sure I shall never do, and read this speech of mine through from end to end, they will probably find passages which they will say show that Great Britain was laying down a different rule with regard to bays here to that which it has laid down elsewhere.

We are doing nothing of the kind. We are not dealing with bays in Europe, or else I should have been wasting your time in going through all this correspondence with regard to the parties in North America. We are dealing with bays here; we are not dealing with general propositions of international law. They may be left to be dealt with by international lawyers, acting, as I hope some day they will act, with the general assent of the European Powers. Of course, until that assent is given, what international lawyers may think or say will carry very little weight. But no European Power, and no American Power, will consent ever to let international law set aside treaties. That is the very foundation upon which international lawyers must proceed.

Here it is a treaty we are construing, and by a treaty we seek to be bound.

I was asked whether the Moray Firth judgment had been appealed, and I answered on the spur of the moment—I find correctly—that the judgment on appeal was delivered in 1906. There has been  
1152 no appeal from that judgment. It was delivered in 1906 by a full court of Scotch judges (I think there were twelve judges), and there is no appeal from that decision. It was a criminal case, and no appeal lies from that decision. So that there you have a judgment in which the territoriality of Moray Firth is affirmed by the Scotch judges, acting upon British statute law, which of course they were competent to administer, and which alone they would be competent to administer, and so they decide that Great Britain, at all events, has claimed that bay. That is the law as it now stands, and as it stands, that judgment is law, and affirms the territoriality of that bay, which is a great deal more than 6 miles.

Then there was another point I wished to refer to.

There was a question during the course of the controversy about an opinion delivered by the English law officers, I think in the 1840's, where they had given an opinion as to the French user of the west coast of Newfoundland. They had said that the French coast of Newfoundland was subject to the exclusive user of France. I call it "French coast" because that was a name popularly given to it. Of course it was the British coast, subject to the French right. They said that the French were entitled to exclusive user. They said that, on the strength of those words in the treaty, which say that the

French are not to be interrupted by the competition of British fishermen.

Now, that is a curious phrase. It might mean that British fishermen might go and fish there, but must keep out of the way of the French, or it might mean, as the French contended, that they must not compete with the French, they must not go there at all while the French were there. Now, these English law officers gave that opinion first.

Then, the opinion was referred back to them, and it was suggested that they had changed it. I venture to say that they did not change it at all. Unfortunately, I have not got the reference before me, but it is within the memory of the Tribunal, that the only difference they made was a very reasonable and proper difference. I will paraphrase their words. They said: Perhaps we expressed ourselves too widely when we said that the user of the coast was exclusive to the French, that they alone might enjoy it, because the British may go there, but they may not go there while the French are there, if by so doing they interrupt the French, so we ought not to have said that the British could not go there at all. But, what we do say is that the British right of going there is practically useless, worthless, because the French are there while the fishing season is on, and as the English may not go there so as to interrupt the French, it is a barren right, if I may borrow a phrase from Senator Turner—it is a barren right, it is no good to them; they may go, but they may not fish while the French are there. So that there was really no contradiction. I only referred to the matter, not because it is of the least importance, but in order to clear the memory of my predecessors from the suggestion, one peculiarly disagreeable to any lawyer, that they would change an opinion at the request of a client.

Well, that, I think, clears up all I have to say on Question 5. I pass from it gladly, leaving it in the hands of the Tribunal. And I venture to say that the British case is proved here with a degree of fullness that really cannot be exceeded. You cannot add to it. I cannot imagine a contract where words are clearer, and where, when you come to look at the circumstances under which they were used, their meaning is more undeniable. When you come lastly to look at the way the words were interpreted by the persons who used them, then the argument is perfectly clear, for, in this case, bays were understood in 1823 by the men who made that treaty, to be the private territorial property of the State whose coasts they indented.

Now, then, I pass to Question 6, and there the argument will be really very short. I have covered most of the ground already, because I have dealt with all the documents I shall have to refer to in dealing



with Question 5, and I think I may trust to the memory of the Tribunal, and go very shortly through the argument without much reference to documents.

I said already, in dealing with Question 5, my difficulty in dealing with Question 6 was not the construction, but the subsequent conduct of the parties.

Undoubtedly for many years, until a late period, no question arose—Great Britain never raised any—as to the right of anybody that had a liberty of fishing on the west coast to enter the bays, but now, let us look at it apart from the conduct of the parties for a moment.

I am not going to say that that is not going to have effect, and will not have effect, but I want simply to state the point as it appeared to Sir Robert Bond, and I think it will be shown to have a 1153 very good foundation on the documents, and anyhow, to strengthen the argument that I have addressed, if it needs strengthening, on Question 5.

You have, when you look at the treaty, a very significant and important variation in dealing with the coast of Newfoundland and that of Labrador. It is more important and more singular when you come to the projets which preceded the formation of the treaty. There were seven conferences which preceded the making of this treaty of 1818. I need not travel over the first and second. The third is a material one. I will refer to the United States Case Appendix, p. 310, which I think is the easiest to follow. The United States on that page put forward their first projet. It was put forward on the 17th September, 1818.

They there put forward as their proposition, that they should—

“continue to enjoy unmolested, forever, the liberty to take fish, of every kind, on that part of the southern coast of Newfoundland which extends from Cape Ray to the Ramea islands, and the western and northern coast of Newfoundland, from the said Cape Ray to the Quirpon island, on the Magdalen islands; and also on the coasts, bays, harbors, and creeks from Mount Joli, on the southern coast of Labrador,”

Those words, “on the southern coast of Labrador,” qualify Mount Joli. They simply indicate the situation of Mount Joli. They do not qualify “bays and harbors.” It is not “bays, harbors and creeks on the southern coast”; it is “bays, harbors and creeks from Mount Joli, on the southern coast of Labrador, to and through the straits of Belleisle.” However, it gives the “bays, harbors and creeks” of Labrador. And then it goes on:—

“that the American fishermen shall also have liberty for ever to dry and cure fish in any of the unsettled bays, harbors and creeks”

Now, what is the origin of that distinction between Newfoundland and Labrador? When you go back to the treaty of 1783, only the coast of Newfoundland was given. It appears in the same volume at p. 24:—

“And also that the inhabitants of the United States shall have liberty to take fish of every kind on such part of the coast of Newfoundland as British fishermen shall use (but not to dry or cure the same on that island) and also on the coasts, bays and creeks of all other of His Britannic Majesty’s dominions in America;”

In neither of these two treaties do they give the bays on the coast of Newfoundland—in neither of them. When they are dealing with “coasts” generally in the treaty of 1783 they mention “bays.” When they are dealing with “coasts” specifically in 1818 on Labrador, they mention “bays,” but in neither of the treaties did they give the bays on the coast of Newfoundland. I think the reason is indicated in what we know of these bays generally. You do not catch cod apparently in the bays. We have that from different authorities throughout the course of this case. You do not catch the cod in the bays, and, in 1818, there was no herring fishery, so that nobody particularly wanted to go into the bays except for the purpose of landing, and for that they took a special privilege when they wanted it. So that there is a very good reason why they should not have troubled to ask for the bays of Newfoundland. They did not want them. They were no good to them. They did not trouble about them at all. In fact, the whole of these particular rights were trivial things to the United States. It was the bank fishery which was really the important one.

Now, when they come to 1818 they are told that they may continue their fishing liberty on the coast of Newfoundland, and they are also offered Labrador, or at least they want Labrador. It had been discussed in the preceding negotiation. So the United States, when they want the bays of Labrador, which were important, ask for them. The bays of Labrador, as we know from Mr. Sabine’s report, did contain the cod. The cod in that part of the world went into the bays, and so, when they were dealing with Labrador, they said: “Well, we must not be content with the word ‘coast,’ we will have ‘bays,’” and they put “bays” in.

Now, that is a very strong circumstance to show that they were not thinking of, and not asking for, bays on the western coast of Newfoundland.

I used this argument already on the last question to show how important bays were. I have used it to show how unlikely it is that that word was being thrown in as a mere superfluous descriptive term, merely indicating the component part of the coasts. The par-



ties attached a most important meaning to it in 1818, and they said:

1154 "Although you are refusing us your bays in the rest of your dominions, though you are not giving us your bays on the coast of Newfoundland, we want them in Labrador," and so they expressed that desire in this proposal.

Well, then, we had our project (p. 312), and there we dropped out the bays of Labrador. Broadly stated, our projet was this: "Coast of Newfoundland, coast of Labrador, and no bays at all anywhere." It will be seen there that the inhabitants were to have liberty to take fish on the west coast of Newfoundland, and on that part of the southern and eastern coasts of Labrador extending from Mount Joli to Huntingdon Island. So we dropped out "bays and creeks of Labrador," and we limit the space within which they may have their fishing right to Huntingdon Island. So that was the difference between us, and of course, under our plan, all bays everywhere would be renounced. They were not content with that proposition. There were various other objections that they took to it, not, I think, very important, but I may mention one of them, for instance, that about the rivers, of which so much was made. We said they were not to take fish within the rivers, and some observation was made upon that. I do not think that is very important. There is no doubt that it became a little more important that we should specify rivers when they were beginning to talk of getting particular bays like the bays of Labrador, because in that case, if they had got into a bay such as existed on the coast of Labrador, they might there exercise their right of fishing in a way which would have enabled them to interfere with the fishery of the river, and so a special provision was made for that, as they were beginning to ask for bays; but I do not need to dwell upon that.

Then the United States were not satisfied with this limitation we introduced. We were not giving them the bays of Labrador, and we were not giving them the full length of the coast beyond Huntingdon Island in Labrador. Those were the main points in which we were cutting down their proposal for fishery rights; and also, of course, we made one very big difference, which I must notice in passing. We would not let them have the privilege of obtaining bait. That was in what I call our renunciation clause. We cut out the privilege of bait, and we also said we would not allow them the privilege of carrying on trade.

Now, the Americans were not satisfied with that. On p. 313 they handed in their memorandum:—

"The American plenipotentiaries are not authorized by their instructions to assent to any article on that subject which shall not secure to the inhabitants of the United States the liberty of taking fish of every kind on the southern coast of Newfoundland, from Cape Ray to the Ramea Islands, and on the coasts, bays, harbors and creeks,

from Mount Joli, on the southern coast of Labrador, to and through the straits of Belleisle, and thence northwardly, indefinitely, along the coast; and, also, the liberty of drying and curing fish in any of the unsettled bays, harbors, and creeks of Labrador."

Thus they failed to agree upon the article as to fisheries, and that was the reason they failed to agree. There was a suggestion which belongs to an argument that I have passed that they failed to agree because the United States were insisting on giving something up. I think I have disposed of that argument. They failed to agree because the United States were not getting something that they wanted, not because they insisted upon renunciation.

And then came the final form in which we practically accept their contentions, and we give them the bays and harbours of Labrador, we extend the area within which the right may be exercised from Huntingdon Island indefinitely northward, and the treaty is agreed to.

They, on the other hand, consent to what was a very large abatement of their claim—they consent to forego the right to obtain bait, which formed part of what I called our renunciation clause. I mention it here because it has a bearing on Question 7. One cannot deal with this question quite in water-tight compartments, and it is worth while asking the Tribunal to keep in mind the fact that we refused to let them have the privilege of obtaining bait, either of buying it or fishing for it. That will have a lot to do with the next question.

And thus the parties have come to an agreement.

Now, what is the agreement to which they have come? Coast of Newfoundland, coast and bays of Labrador for fishing; and for drying and curing, bays of a particular part of the coast of Newfoundland, namely, the southern part from Cape Ray to the Rameau Islands. But not a word said about fishing in bays on the southern or western coast of Newfoundland. It was not given, and it was not renounced. It does not appear there in the grant or in the renunciation.

It was not necessary to renounce that which never had been 1155 granted. That renunciation applied only to the non-treaty coasts; it did not apply to this coast at all, so that there was no occasion to include that in the renunciation because the renunciation applied to something else.

Now, this whole argument is an argument which, I submit, would stand good and would be very difficult for the United States to meet under the ordinary rules of construction but for the fact that we have not maintained the claim. I have to face that fact—we have not maintained the claim. Why have we not maintained the claim? We have not asserted it, because, really, it was a matter of so little interest; and my difficulty attaching to this part of my case on



Question 6 disappears when you think of how little anybody cared for those bays. We are fighting for them now, but why are we fighting so strenuously now? I am fighting for them now to maintain the jurisdiction of Great Britain. The United States are fighting in order to break, or to oust the jurisdiction of Great Britain. I do not think that we have the distinguished honour of Mr. Root's presence amongst us merely for the sake of a few herring. They are questions really of jurisdiction and of sovereignty which are far more important. That is what we are really anxious about. But all through these years the United States were not catching herring in these bays; when they wanted herring for bait they bought it. Sir James Winter, I thought, with great candour and freshness, said the trouble began when they wanted to fish there, a thing which they had never done before. They really had not been fishing there, they were fishing elsewhere where they got fish, where they got cod-fish, and they bought their bait when they wanted it. The question did not arise and was not argued on the part of British statesmen with any great degree of knowledge. Sir Robert Bond, to whom the question was important, undoubtedly raised the point when the controversy became acute, and both times he had to face the fact that in the meantime there had been many admissions—I am not going through them; and I dare say they will be all brought to the attention of the Tribunal by the other side, but I am sure the Tribunal are sufficiently familiar with them—against our right, and I do not want to minimise the effect of them. I only say that there are those admissions, and they do not really affect the substance or merits of the argument upon the question of construction.

Now I pass, under the stress of some speed, to Question 7. It is a very, very important question, and I am sure that if I do not succeed in finishing in the few minutes at my disposal I shall have the indulgence of the Tribunal for a very few minutes on the other side of the adjournment. Question 7 is a question which has very greatly puzzled and embarrassed me, until I heard the excellent speech of Mr. Elder. He threw light upon the subject of a most valuable kind. We all wanted to know what on earth the question meant. I had read that question again and again until I had almost lost my capacity for appreciating the meaning of the words used in it. What are they at? Just think of it!

“Are the inhabitants of the United States whose vessels resort to the treaty coasts for the purpose of”——  
fishing—

“entitled to have for those vessels, when duly authorized by the United States in that behalf,”——

What have I to do with the authority of the United States? Have we anything to do with what the United States may choose to author-

ise or leave unauthorised in their vessels? Has that anything to do with me, or anything to do with this treaty?

“the commercial privileges on the treaty coasts accorded by agreement or otherwise to United States trading vessels generally?”

Now I ask again: What do they mean when they say, are the United States entitled? Entitled how? On what title are they inviting the judgment of this Tribunal? Do they mean entitled by the treaty? No, they do not mean that. They do not pretend to mean that, because the treaty certainly gives no title to any vessel to have commercial privileges. Mr. Elder would not maintain that for a moment. So, they do not mean entitled by the treaty. Then, do they mean, entitled by agreement or otherwise? If they are asking me a question as to the validity and extent of the rights which they claim to possess under some agreements or otherwise, I ask: “Where are your agreements; produce them; let us see what kind of title they give you. You are suggesting here that they give commercial privileges to United States trading vessels generally. Very well, show us that they do so if you want our opinion upon them.” “Oh,” says Mr.

Elder, “I do not want to produce these other documents; you 1156 must not have the documents, because the question assumes

that they exist and not only assumes that they exist but that they give rights to trading vessels generally, and that is all you have to do with it.” I say: “Very good; let me assume that they give rights to trading vessels generally; does that show that the treaties which give rights to trading vessels give rights to vessels which are not trading vessels but fishing-vessels?” If you say that the language used by these documents which conferred rights on trading vessels was broad enough to cover fishing-vessels, I say: “Produce your documents.” Rights given to the owners of trading-vessels are very particular and special things. You do not give to a trading vessel the right to do what it likes. You give to a trading vessel the right to trade; that is to buy and sell. That is not a right conferred by a fishing treaty nor upon a fishing-vessel. If you want to know whether vessels may exercise such rights, then show us the documents creating the rights. “No, no,” says Mr. Elder, “you cannot have those documents.” Mr. Elder says: “You have got my speech; that is quite enough; no documents, no treaties, no agreements.”

Well, Mr. Elder’s speech was very good, but it is not quite a substitute for the documents under which he is claiming certain rights and asking this Tribunal to affirm those rights. He cannot get trading rights under this treaty. How are trading rights determined? They are determined by separate and special treaties, and one thing clear in all these documents for the last hundred years is that we have kept this fishing right apart from trading; we would not even let them trade to the extent of buying bait. We would not even let



them buy bait for their fishing; we would not even give them the right to pursue the industry of fishing as a whole—that is to say the fishing trade in those waters. We would not let them carry on the whole trade of persons who buy and sell fish. We would only let them exercise one particular right, so that the jealousy of the parties with regard to trading rights is apparent at every stage and step of the negotiations and transactions between them.

What right have they to come now and ask this Tribunal to say whether they are entitled to have these rights under documents which they do not produce and cannot specify? I do not believe they can specify one single treaty of trade in which the language can be so stretched as to include fishing-vessels. Why? Because the characteristic of a trading vessel is that it must not be allowed to hover. A trading vessel has to trade. It may take its cargo in one place, and deliver it in another. Taking its cargo in one place, it may go elsewhere to deliver that cargo, but it must be either going or coming, loading or unloading. A trading vessel is not allowed to take up its position off the coast and wait about for some favourable or convenient opportunity to do something which it has not told us it is going to do—it may be to land its cargo conveniently, without any undue interference on the part of the customs officer, in some creek, or cove, or inlet. So they are not allowed to hover, and if you are going to give trading vessels fishing privileges, you must take away their trading privileges.

A very pertinent question was put by the Tribunal to Mr. Elder, and also for consideration on the part of counsel for Great Britain, namely: "May an inhabitant of the United States fish from a trading vessel?" The answer is "yes," but if he does he must be content to have the trading privileges taken away from that vessel. He cannot have both.

SIR CHARLES FITZPATRICK: Why?

SIR W. ROBSON: Because we cannot allow a trading vessel to hover, and we have complete control over trading rights. No treaty has taken away from us our right to say to a nation: We will, or will not, trade with you. We have absolute unrestricted control over trading rights, and the United States have framed their question because they felt that difficulty. They dared not ask you what their trading rights are, because their trading rights may be altered tomorrow. No judgment of an international tribunal upon such a question would have more than twenty-four hours value. If we found that these trading rights were being exercised in an inconvenient way, they not only could but should be immediately recalled, and if any United States' inhabitants, carrying brandy to Newfoundland said: "I will amuse my leisure hours, as I enjoy all the rights of a fishing-vessel, by fishing, and, for that purpose my ship shall pause,

the inhabitants of Newfoundland may wait a little for their brandy while I catch cod;” he gets cod, but the moment he began to do that he began to have his vessel hovering off the coast in contravention of, and disobedience to, the hovering Acts by which Newfoundland, like every other civilized state, protects its revenue. The moment he began to do that they would say: “If you are going to treat  
1157 your trading rights in that way we begin to suspect that you want to put your brandy off in the night and you will never come to port with your brandy at all; you will catch your cod, smuggle your brandy, and go back.” Therefore, Newfoundland would be compelled to say: “We withdraw your trading rights the moment you begin to fish, not because we object to your catching a few cod, but because the moment you begin to fish you begin to hover, you begin sailing about our coasts and ports and bays, and we will suspect your intention. You may be the most innocent man with the most innocent intentions; you may not have brandy on board, but only stockings; you may be delaying because you enjoy the fresh air of our territorial waters; your motives may be most admirable, but we cannot stop to enquire into your motives; you have your ship’s papers, but they do not tell us the ethical quality of your captain and crew from the revenue point of view, and therefore we will not allow you to hang about here and your trading rights must go.” Would not Newfoundland come within its rights, would not Newfoundland be acting within its duties and according to its duties? Mr. Elder and the United States know that they cannot call upon this Tribunal, directly or indirectly, to give any judgment which shall appear, or affect to confer trading rights upon them.

What is the right they want? Mr. Elder was quite candid about it. He wanted the right to buy bait. There is no secret. Look at what that means. These two States, Newfoundland and the United States, have been engaged, as we know, in one of those deplorable fiscal conflicts that are injurious to both, and most injurious, of course, to the smaller State. I have already dealt with that circumstance. Mr. Elder, I do not think, laid quite sufficient stress upon it. In the speeches from which he cited, Sir Robert Bond makes his position perfectly clear, that he felt it his duty to fight against bounties and closed ports. Look at p. 424 of the Appendix to the Counter-Case of the United States and you will find the speech from which Mr. Elder cited some passages. I will just read one or two words to show what Sir Robert Bond’s position was. Let us see whether it is fair that his fiscal policy should be circumvented, because that is the object of Question 7. Sir Robert Bond says:—

“For fifteen years, by a free and generous policy toward our fisher friends of the New England States, we have endeavored to show them that in our desire to secure a measure of reciprocal trade



with their country we intend them no injury whatever; on the contrary, we desire to compete with them on equal terms for the enormous market that 85 millions of people in the United States offers for fishery products. In 1890 we said to the people of the United States, Remove the tariff bar that shuts our fishery products out of your markets, and we will grant you all the supplies that you require at our hands to make your fishing a success."

I call that a fine, statesmanlike, and generous declaration of policy. Then he goes on:—

"The offer still holds good. For the reason that I have explained, the past fifteen years the fishermen of the United States have received those supplies"——

That is their bait, and so on——

"without the tariff barrier to the admission of our fishery products into the United States being removed by act of Congress, but we find the very men"——

That is the fishermen——

"to whom we have extended such generous treatment are precisely those who have worked most strenuously to injure us in our trade relations with their country."

What he meant was that the fishermen who have got this bait and these supplies, and who could not carry on their industry without them, have gone back home to the United States and said: "Do not renew this reciprocity treaty." The reciprocity treaty allowed the fish of Newfoundland to come in without a tax, and the fishermen said, and their representatives in Congress backed them up: "What we want is to keep out the products of our Newfoundland friends while we go on buying bait by their kind permission in their ports." Well, Sir Robert Bond is a human being with the ordinary passions and feelings, I suppose, of a human being, plus those of a politician, and he said: "That is a very good arrangement for the United States; we are to give you trading privileges and you are to close your markets against us. You cannot even get your fish here without our permission, because you will not take the trouble to come and fish for bait; it does not pay you; what you want to do is to get your bait here, to purchase it and then to carry it off to the banks and fish with it. It is necessary that we should co-operate with you before you can catch your fish, and, under those circumstances, you are asking a bit too much of us when you ask that we should continue these privileges while the very fishermen whom we are helping and whose industry we are enabling to be carried on, go and stir up the United States to reject this treaty which we are proposing, and to reject it in order to destroy our market in your country." That was a preposterous position for the

United States to take up, but Mr. Elder opened the case as if Sir Robert Bond were a monster of unreason.

Sir Robert Bond's speeches, show that the motives upon which he appears to have been acting were those that animate most human beings I have met in my short pilgrimage through this world. No State likes to have an attack made upon it, such as was made by the fishermen of the United States upon Newfoundland, and not make some resistance to it. Sir Robert Bond made the only resistance he could. He said: "If you will not give us a fair chance, such as this treaty offers to us in your markets, we will not give you these trading privileges which we are entitled to withhold."

Now, the United States come and say: "Who has brought all this trouble about?" Says Mr. Elder, "one man—Sir Robert Bond." Well, you have one man on one side of the question and about 85,000,000 on the other side of the question, and yet Mr. Elder would have us think that really the 85,000,000 are in serious apprehension of Sir Robert Bond. There will be no peace with Sir Robert Bond there, or with Newfoundland there—no peace until we get our trading rights. Well, the population of the United States is, as I have just indicated, about 85,000,000. I forget the population of Newfoundland. I dare say that Sir Robert Bond himself would not be unwilling to admit that it is smaller than the population of the United States, but could any one suppose that the United States are in the slightest degree apprehensive of what may be done by this little, self-governing colony in the northern seas, knowing that they have got, as a barrier between them and Sir Robert, the Imperial authority if it is required to be exercised? Apparently they have also got the people of Newfoundland who, when they were called upon to give a judgment upon this matter, turned out Sir Robert Bond.

But, that is not enough for Mr. Elder: "I have got the security of the Imperial Government, I have got with me the good-will of the people of Newfoundland, I have got behind me a population of 85,000,000, but with Sir Robert Bond in front of me, there is no peace."

I say that is not treating this question in a practical spirit at all. Sir Robert Bond has made his fight with such poor little weapons as he has, and he has been fighting a fight perhaps more distinguished for its courage than its success. But, it is not for this Tribunal to take away from him any little weapon that he has. The only weapon that he has is his bait. That is what he is fighting the United States with. "You shall not buy your bait unless you do this, that, or the other thing for me." And Mr. Elder comes and says: "In the name of peace, in the sacred name of law and order, under Question 7, we demand the right to buy bait whether Sir Robert Bond and New-



foundland like it or not." I say it is a right which he admits to be raised by this question and it is a right of which this Tribunal is not entitled to deprive Newfoundland.

It is a sovereign right. It may be very unwisely used, as other sovereign rights may be, but it is the sovereign right of Newfoundland and I do not think that anyone can take it from the colony. Sir Charles Fitzpatrick put a question to Mr. Elder, p. 5629 [*supra* p. 961]:—

"SIR CHARLES FITZPATRICK: You say that under the Treaty of 1818, in the exercise of the privileges conferred by the treaty, you say you could not buy bait for the purpose of exercising your treaty rights of fishing?

"MR. ELDER: Quite so.

"SIR CHARLES FITZPATRICK: But under your commercial privileges, you can supplement the treaty?

"MR. ELDER: Yes."

Well, now, that is the whole point of Question 7. It is framed with extreme ingenuity and ambiguity: Are the United States entitled to commercial privileges? That means: Are they entitled to buy bait? I say, no, we gave no such right by this treaty or in relation to this treaty. No such right can be given to them at all, and no such right ought to be given to them. The answer that I respectfully ask the Tribunal to give to this question is: "No, they are not entitled to have commercial privileges; they have not framed the question in a way that we could answer it upon documents that conferred the privileges; we cannot answer it upon those documents, and, in so far as this treaty is concerned, so far from their being entitled, there is not a word respecting trading privileges at all."

1159 As to all this about the United States licensing its vessels to trade, I ask: What if it does? It may license its fishing-vessels. We are not concerned with their licences. Their authority does not bind us. We have nothing to do with that. I listened with amazement to Mr. Elder's statement about the register of the United States. He said: "We may have to alter our register." What if they have? I do not know and I do not care what the registry of the United States amounts to, and what it does. I only know that the fishery right is a thing secured by a particular document with which alone we are concerned in this Tribunal, and it gives no trading rights, and that when the document comes to be examined and interpreted in the light of the negotiations that preceded it, it not only gives no trading rights but it excludes trading rights.

SIR CHARLES FITZPATRICK: Are trading rights conferred upon the vessel or the individual?

SIR W. ROBSON: On the individual. I cannot understand the use of the word "vessel." I am taking it here because it is put in the

question, and I have already pointed out, in dealing with the second question how very illusive it is to substitute one word for another. The rights are conferred upon individuals. You may speak of a vessel, but what you mean is the owner or the master. The owner and the master may have trading rights, and they may also think they have fishing rights, and they may become fishermen if they please. But, if they choose to become fishermen, by what right does any Tribunal in the world say to Newfoundland: "You shall give trading rights to those persons who have become fishermen." It is absolutely beyond the jurisdiction of this Tribunal.

SIR CHARLES FITZPATRICK: I suppose you cannot deny that an inhabitant of the United States, under the treaty of 1818, would have the right to take fish if he were on a trading vessel?

SIR W. ROBSON: Certainly; I have said so.

SIR CHARLES FITZPATRICK: Therefore the difference you suggest is that if he should exercise his treaty rights in that way the hovering Acts would apply?

SIR W. ROBSON: Yes.

SIR CHARLES FITZPATRICK: If he does not exercise his right of fishery under the treaty what is there to prevent him exercising his commercial privileges?

SIR W. ROBSON: The legislation of Newfoundland.

SIR CHARLES FITZPATRICK: On what ground?

SIR W. ROBSON: The moment he begins to exercise his commercial privileges—

SIR CHARLES FITZPATRICK: He has ceased to be a fisherman.

SIR W. ROBSON: There is no treaty conferring trading rights between the United States and Great Britain. Where are trading rights conferred on the inhabitants of the United States?

THE PRESIDENT. There is only the declaration of 1830.

SIR W. ROBSON: That is all, and it may be altered to-morrow.

SIR CHARLES FITZPATRICK: Still, if it is not altered?

SIR W. ROBSON: But this Tribunal would not assume to give judgment upon municipal legislation. That is outside of the intention or scope of this Tribunal. Any man on a trading vessel may fish, if he likes, if he does it under the treaty of 1818, which is a treaty for ever; but the moment he does that he brings into peril his trading rights which do not last more than twenty-four hours if Newfoundland so pleases. That is the answer. Let any man try it on. Let him have his cargo of tobacco on board when he stops in order to get cod-fish. The statesmen of Newfoundland would be imbecile to say: We are going to allow you trading rights under those conditions. If you want to trade, trade like a man, and an honest man; go from one port to another port and sell your goods; do not  
1160 proceed to linger on the way to get fish. If you want to get



fish, come again like an honest fisherman, and catch your fish without any brandy on board except what you may require for your own personal sustentation. But it is suggested now that they are entitled to undo entirely the effect of our refusal to sell them bait in 1818 by saying: "The United States has given us a licence to trade"—as if we had anything to do with that—"and that therefore we are going to trade."

THE PRESIDENT: Is the treaty of 1818 the only basis upon which the award is to be given?

SIR W. ROBSON: I would submit that it is, but I am not really concerned with that particular point. I submit that this is an international Tribunal, and that its jurisdiction is strictly limited to international questions, and that none others are put. But take that against me, if need be, for the moment; it does not affect my argument at all. I say there is not the material given by the United States to enable any judgment on municipal legislation to be given. You have not the material. All this Tribunal is told is that there are or may be agreements which confer trading rights on trading vessels. In fact, there are no such agreements conferring any such trading rights. There is an Order-in-Council, not an agreement; and not only are there no agreements, but there is distinct legislation on the part of Newfoundland, appearing in these documents, and therefore brought to the knowledge of this Tribunal, forbidding the sale of bait. What Mr. Elder is asking is that you should give an answer to this question which the United States will be able, as he himself admits, to use as a claim upon Newfoundland for the sale of bait, and which will enable the United States to say: "We are entitled to exercise our trading rights, whatever they may be; the international Tribunal has said so, and therefore, we want bait." How can this Tribunal give an answer?

SIR CHARLES FITZPATRICK: Is it your contention that this question must be construed absolutely in the light of the paragraph of the treaty of 1818 which occurs on p. 1 of the Appendix—that is to say, in the light of article 1 of the convention; that you cannot look at anything else except article 1?

SIR W. ROBSON: I have said that I do not mind whether you can or not. My own view is that this is a purely international Tribunal, and that its purview must be limited to international considerations; but pray do not take me as saying that my argument rests upon that. It does not rest upon that; that is to say, it rests upon something which is absolutely without dispute. You might dispute, for instance, the jurisdiction of the Tribunal over these words, "or otherwise."

THE PRESIDENT: There is one passage in article 1 which troubles me, and I should like to hear what your view of it is:—

“And, whereas, differences have arisen as to the scope and meaning of the said article, and of the liberties therein referred to, and otherwise in respect of the rights and liberties which the inhabitants of the United States have or claim to have”

SIR W. ROBSON: These words, I say, of course are to be construed according to the general scope of the document itself:—

“And, whereas, differences have arisen as to the scope and meaning of the said article,”——

That is, article 1, regarding the fishing rights alone—

“and of the liberties therein referred to,”——

In article 1—

“and otherwise in respect of the rights and liberties which the inhabitants of the United States have or claim to have in the waters or on the shores therein referred to!”

SIR CHARLES FITZPATRICK: Claim under what title?

SIR W. ROBSON: I should say they claim——

SIR CHARLES FITZPATRICK: Article 1?

SIR W. ROBSON: Mainly under article 1, and possibly under other documents, if there are any. But what are the rights they claim? They are not trading rights. They are rights in the waters or on the shores which are not trading rights. Obviously 1161 they are connected with the class of right which is mentioned in article 1. Just think what an enormous scope would be given to the jurisdiction of an international arbitration if, when it is called upon to deal with territorial questions relating to rights in the waters or in the territory of a particular nation, it is asked to pronounce upon the scope and effect of documents which are not only not produced, but which we have never even dreamed of looking for. Just by accident for this purpose we have in the Appendix the legislation of Newfoundland forbidding the sale of bait. We do happen to have it there, but we certainly did not put it there with any idea that it would affect Question 7, because we never for a moment supposed that the words “or otherwise,” which are to be construed with such limitations as might be necessary to bring it into accord with the general scope of the document, meant trading rights.

Trading rights have never been the subject of discussion between us. They have been the subject of conflict, but there has never been any claim on the part of the United States that they were entitled to have trading rights. I never heard such a suggestion, certainly during the period in which, as a Law Officer of the Crown, I have been concerned, in a subordinate capacity, with these questions. I never



heard anybody say: "We must have an arbitration to decide the question of our trading rights." If anybody had said that to me, what would have been my answer? I would have said: "What is your difficulty about trading rights, because, if you have any difficulty, we can easily settle it by Act of Parliament. If we think you are getting too much, Newfoundland can pass an Act by which it will give you less; if we think you are not getting enough, we may endeavour to persuade Sir Robert Bond to give you a little more." That would be my answer. I do not know but that I might carry this over the adjournment for a few moments. It is such an important question, and I would be obliged if the Tribunal would adjourn now and allow me a few words after the adjournment.

SIR CHARLES FITZPATRICK: Question 7 is one submitted by common agreement between the parties. Both parties agreed to submit this question; both parties are responsible for it.

SIR W. ROBSON: Both parties are responsible for the submission of the question, but then I would very gladly assent to the submission of any question if I thought the answer was bound to be in my favour.

SIR CHARLES FITZPATRICK: You are responsible for it as well as the other side. How can we answer that question without having the agreement referred to in the three last lines:—

"the commercial privileges on the treaty coasts accorded by agreement or otherwise"

SIR W. ROBSON: Exactly; you can only answer it by a negative.

SIR CHARLES FITZPATRICK: Is there not an obligation on both parties to give us the material necessary to answer the question?

SIR W. ROBSON: It is the duty of the United States because they want an affirmative answer. We submitted the question because the United States asked for it. It is their question, they submit it to us and they say they want it to be submitted to the Tribunal.

SIR CHARLES FITZPATRICK: We know nothing about that here.

SIR W. ROBSON: I am saying so. You asked me the question.

SIR CHARLES FITZPATRICK: But we know nothing about which party may have proposed it.

SIR W. ROBSON: In that case I need not trouble with any observations about Question 7. One has no difficulty in inferring who put it there, and whether you infer who put it there or not does not matter. Either party is entitled to agree to the submission of an irrelevant question. If the United States, or if either party, wants a question submitted, we say: "Certainly, submit it if you like. You are submitting a question to which the answer can only be against you, but if you like to submit it do so. You are submitting a  
1162 question to which you cannot get an intelligible answer, because your question is not intelligible; but if you like to submit it

do so." Our position is: "If you like to put this question you must prove it; or, if you like, both of us may put the question, but it rests with the United States to prove it." One only needs to look at the question to see who is asking it. Are they entitled to have commercial privileges? It is they who are asking for commercial privileges, not we who are begging leave to give them. It is they who are asking for them, and I say: "You must prove it by your agreements—by yourself in proper form; to make your question good you must make it intelligible first and then prove it." Perhaps I might continue a little later, because clearly I ought not to leave the argument in its present position without saying anything further upon it, and there are one or two words that I want to add generally before I close.

THE PRESIDENT: The Court will adjourn until a quarter past 2 o'clock.

[Thereupon, at 12.15 o'clock P.M., the Tribunal took a recess until 2.15 o'clock P.M.]

AFTERNOON SESSION, TUESDAY, AUGUST 2, 1910, 2.15 P.M.

THE PRESIDENT: Will you please to continue, Mr. Attorney-General?

THE ATTORNEY-GENERAL, SIR WILLIAM ROBSON: I think the difficulties which have arisen in connection with this question, will really vanish when one comes to look at the question strictly, and ask what is the obligation of each party in relation to this question. The question asks whether the United States are entitled to have certain privileges which they say are accorded by some agreement they do not produce.

The burden of proving that they are so entitled rests of course on them. They are asking the Tribunal whether they, the United States, have got a title to certain privileges. They must convince the Tribunal that they have that title. It is not for us, Great Britain, to show that the United States have got the title they claim. It is for us, when once that title is produced, to criticise it and contest it. We say there is no title and they cannot produce it; and therefore they cannot get an affirmative answer to this question in their favour.

We are quite content that they should put the question to the Tribunal, and we join with them in putting the question to the Tribunal, but we say that the answer can only be one way. We say the United States have got what lawyers describe as the onus of proof cast upon them, the burden of proving their case lies on them. And it is for us to say that they have not fulfilled, that they have not met, that obligation of proving their case.

Now how do they prove their case? They have no proof at all—absolutely none. They do not show any title; and when they come



before this Tribunal, instead of showing a title, they try to change the question; they try to treat this question as being that which it is not. They want a very different question asked now. They say what they want is to ask whether there is anything in the treaty disentitling them to commercial privileges. That is a totally different question. Instead of proving their title, they now call upon us to say: What is there in the treaty to show that we have no title? I say the treaty does not touch the question—absolutely it does not touch it. The treaty has nothing to do with commercial privileges; it neither gives nor withholds a title to commercial privileges. The treaty is dealing with something else, and it is ridiculous, in my opinion, to ask the question as Mr. Elder now wants to have it put: "Are the United States disentitled?" It is not enough to prove that some particular document does not prevent or preclude them from getting privileges. That is not the question. The question is: Have they got the privileges; are they entitled? That is the question, and, when they come to deal with it before this Tribunal, they find they cannot deal with it, because they can only deal with it by producing the agreement which they say the question assumes to exist. I do not think the question does assume it to exist. This question assumes that the United States, who have got to prove their title, will produce the agreement which they suggest has conferred on them the title. But, even supposing that it does assume the agreement to exist, that still does not help the United States very much; because it is a question how far the agreement goes. What kind of right does it confer? Upon whom does it confer them? That is the point. Does it confer  
1163 a right to trade permanently? We say that no such agreement can be found, and not only can no such agreement be found, but the only evidence before the Tribunal is that the trading privilege, which they say they want under this question, is forbidden by the law of Newfoundland. The Bait Act applies to both trading vessels and fishing vessels—both. They have no right to buy bait under either their trading privileges or their fishing privileges. But we know that it is the purchase of bait they want to get at. What, therefore, is the motive of the question? They want, if they can, to get an affirmative answer to this question as to which they offer no proof, so as to be able to turn around afterwards to Newfoundland and say: "Now, then, the Tribunal has given an affirmative answer to this question, and having got an affirmative answer to the question, we are entitled to have commercial privileges accorded by grant." Newfoundland would say: "Where is your grant?" You still could not show it, because there is none. But they say: "We are entitled to have commercial privileges, by agreement or otherwise." And they would point to our Order-in-Council and say: "Now, then, you are

bound to give us, under that finding, the privileges of buying bait." In other words, they want to use the finding that they hope they will get on this question in order to defeat the Bait Act, which is a perfectly legitimate act of sovereignty on the part of Newfoundland. But it is to be used in that way, as Mr. Elder intimated very clearly. He said: Of course, if, notwithstanding such a finding as he asked, Newfoundland still refuses to give the privileges, then the United States would have to consider what measures they would take; which was language, of course, moderately and cautiously expressed, but nobody could fail to detect in it a tone which was not unlike that of menace to Newfoundland.

Now I say that they are not entitled to have an answer to use in any such way. They are entitled to have this question strictly construed. And when one looks at the question he sees that the burden of proof is cast on them, and they have to prove what their title is. They do not do it; they show no title whatever. On the contrary, they want an answer to the question founded upon a question which is not put here at all, namely: Is there anything in the treaty to disentitle them? If the question had been put in that way, I can well imagine whoever acted for England in the transaction, the English agent, saying at once "Why, nobody pretends that the treaty forbids commercial privileges. Why do you put such a question as that?" That was not the question suggested to the British agent: it is not the question now put before the Tribunal. But it is the question Mr. Elder wants to ask, and the question that the United States want to ask, because they say: "The real meaning of the question is whether or not anything in the treaty justifies Great Britain in discriminating against the use by the inhabitants of the United States of the same vessel for trading and fishing purposes?" Why did not they ask that question? They do not ask it. The treaty does not deal with the matter: it is completely outside it. It gives one right, and the other rights, if they exist—which they do not—are given by other documents. They exist not as a right. There is no title in the United States to have trading rights under the Order-in-Council; not the slightest title. That is not their title to have rights. The Order-in-Council does not give them the slightest right: it simply refrains from imposing a barrier. No American could bring an action against the British Crown because it did not give effect to its own Order-in-Council. A right and title means something upon which you can sue, something that you can enforce by a properly framed action in the appropriate court. The Order-in-Council gives no such right. There is absolutely no title here at all; and if they want to get an affirmative answer, they cannot do it, without showing a



title. In fact, what they want to have the opportunity of saying to Newfoundland is that it is a breach of the treaty to enforce the Bait Act. That is what they want—some answer which will enable them to put up that argument; and I would ask anybody—I would ask one of my learned friends on the other side of the room: Can they seriously contend for a moment that the Bait Act was not within the competence of Newfoundland; that it is not a perfectly legitimate Act? It is just as legitimate as their Tariff Bill, which keeps out Newfoundland fish; just as legitimate. And it will exist after this Award is passed, forbidding any country to purchase bait in Newfoundland waters. Why, then, do they want an answer to this question which, as Mr. Elder says, is aimed at their getting bait? Because they want to use the Award of this Tribunal against the validity of the Bait Act. They want to try to get an opinion of this international Tribunal so as to try to cast a doubt or slur upon a measure of municipal legislation. They want to say that that Bait Act is a discrimination against them. It is not.

JUDGE GRAY: Of course, Sir William, you recognise the facts that, whatever may be, according to you view, the infirmities of this question, it was framed by both sides?

1164 SIR W. ROBSON: Yes.

JUDGE GRAY: And submitted to this Tribunal?

SIR W. ROBSON: We do not know who framed it.

JUDGE GRAY: It is framed by both sides.

SIR W. ROBSON: It is put before the Tribunal by both sides.

JUDGE GRAY: Oh, yes.

SIR W. ROBSON: It is put before the Tribunal by both sides, for answer; and we ask the Tribunal to answer it. We ask the Tribunal to say, "No." The United States agree with us in putting this question before the Tribunal, and they ask for an affirmative answer. We say, in answer to their case, "You do not make out any case for an affirmative answer." That is the position. No matter who actually framed the question, it is here, by consent of both parties. We ask that it shall be answered as much as the United States ask it. We desire the Tribunal to take it into consideration as much as they do. It is the request of both parties with which the Tribunal is dealing. But now, when we come to deal with the question, we say this question ought to be answered in a particular way; because the burden of getting the affirmative is cast on the United States, and they do not meet that burden. If they want a declaration that they have a title to a particular thing, they must prove their title; and the moment they are called on to prove their title, they say: "Oh, no; we are not going to prove a title at all. We are not going to submit any documents to prove a title. What we mean by the question

is, not what the question says, but a different question, namely, 'Is there anything in a particular document to disentitle us?' That is how they are putting it. I say that is not the question at all.

All that this Tribunal have, in my respectful submission, got to do with this question is to call upon the United States to show the title which they here allege. That is the first thing they have to do. Where is the title by which you say you claim commercial privileges? If you show that title, you are entitled to an affirmative answer. If you do not show that title, then Great Britain is entitled to a negative answer to this question. And I say that they cannot show, and do not try to show, any title. Instead of meeting the burden cast upon them by the question, they wish to alter the question altogether.

I say the burden is cast on them, and they have certainly not as yet attempted to meet it. All they have done is to show their motive for putting the question, and it is a motive which evinces a desire on their part simply to get an answer with which they will endeavour to discredit the perfectly valid municipal legislation of Newfoundland in regard to bait; in other words, to get an answer which they can use to undo the intention of the framers of the treaty, who excluded them from the right to purchase bait.

There, after all, is all that can be said upon the question, and I do not propose to trouble the Tribunal further, because the argument, I think, if considered, is conclusive.

There is one point on which I desire to say a word before I sit down. It is in regard to a question that was put to me from the Tribunal in relation to the second question in regard to fishing by inhabitants, as to which, I think, my answer may give rise to some misapprehension. I was asked whether Newfoundlanders had the right to employ foreigners. I said they had. And I was asked whether that might not be a discrimination if it were forbidden to the United States. I said there were circumstances under which it might perhaps be regarded as a discrimination. Well, that may give rise, and I believe it has given rise, to some misapprehension as to the view I take of the rights of Newfoundland. I certainly do not intend, and I think I have not said anything which should seem to cast the slightest doubt upon the rights of Newfoundland, to do as it thinks fit with regard to the rights of foreigners. Whatever Newfoundland chooses to do in the exercise of its sovereign rights cannot enlarge the liberty of the United States. That liberty can only be enlarged by the action of Newfoundland itself. And, supposing that Newfoundland did choose to employ foreigners, which is a very unlikely contingency, not one of a practical character worth troubling this Tribunal about, but, supposing it did—as, of course, I suppose in some sense the United States inhabitants themselves might be



1165 treated as aliens for this purpose, and yet find employment on Newfoundland coasts—that would not entitle the United States to employ foreigners, because the range of the rights possessed by Newfoundland is very much larger than the range of the rights possessed by the United States. The United States are restricted to their treaty in Newfoundland waters, whereas Newfoundland has rights which range over the whole sphere of territorial jurisdiction; and it may employ aliens or exclude aliens as it pleases. Of course, that is a question of legal right, and does not affect and cannot enlarge any privileges the United States possesses.

I think I have now dealt with the subjects that I desire to put before the Tribunal, and I repeat the apology which I think I have often made in passing at the necessary length of my remarks. I have certainly not willingly extended them. The subjects dealt with are of such magnitude and such complexity that it is almost impossible to exhaust them. I hope I have not exhausted the patience of the Tribunal, who have been so courteous and so attentive, and I thank the members of the Tribunal very gratefully and sincerely for the kind patience with which they have heard me.

THE PRESIDENT: The Tribunal will take a recess for five minutes.

SIR W. ROBSON: May I hand in informally, Mr. President, the answer of Great Britain to the statement of the United States as to statutes and regulations?<sup>a</sup>

THE PRESIDENT: Yes.

[The Tribunal thereupon took an informal recess for five minutes.]

1167 THE PRESIDENT: I will ask Senator Root to begin his address to the Tribunal.

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<sup>a</sup> Appendix (G), *infra*, p. 1395.

ARGUMENT OF THE HONORABLE ELIHU ROOT ON BEHALF OF  
THE UNITED STATES OF AMERICA.

SENATOR ROOT: Mr. President and gentlemen of the Tribunal: I beg you to accept my congratulation upon the approach of the end of this long task which has been imposed upon you, to listen attentively and laboriously to the arguments of counsel. It has been, necessarily, a severe tax, not only upon the time, but upon the powers of the members of the Tribunal, for so long a period to listen and not to act. Yet I cannot doubt that you will feel that the dignity and importance of the controversy which is submitted to you justifies the demands that have been made upon you. It is not alone a controversy that, through lapse of time, has acquired historic interest, that, through the participation of many of the ablest and most honoured statesmen of two great nations through nearly a century, has acquired that sanctity which the sentiment of a nation gives to the asserting of its rights, but it is a controversy which involves substantial, and, in some respects, vital interests to portions of the people of each nation.

The fishermen on the coast of Massachusetts and of Maine are poor and simple folk. They live upon the fruit that, with hard toil and danger, they win from the waves. They are not as important a part of the United States to-day as they were in 1783 or in 1818; but, while their comparative weight and importance have declined, their positive importance is as great now as it was then, and greater still. Every consideration that moves a sovereign nation to regard and maintain the interests of its own people urges the United States to press upon you this view of its controversy.

The Attorney-General has pointed out that behind these fishing communities upon the New England coast stand the eighty-five millions of people of the United States. Ah! yes. But behind the fishing communities and traders of Newfoundland stand the hundreds of millions of people of the British Empire—that great Empire whose pride and honour it is ever to have safeguarded and maintained the interests of every citizen. And when two great nations, bound to protect the interests of their citizens, however humble, find themselves differing in their views of rights which are substantial, find themselves differing so radically that each conceives itself to have a right which it cannot abandon without humiliation, and cannot maintain without force, a situation arises of the gravest importance and the first dignity. No function can be assumed by any



tribunal upon this earth of higher consequence than that which you have now assumed, to substitute your judgment for the war which alone, without such a judgment, could settle the questions of right between these two great countries. I cannot doubt that you will feel, as I feel, that the long, and laborious, and patient, and inconspicuous work of such a proceeding as this is of greater value in the cause of peace among men than a multitude of speeches in congresses and conventions, lauding peace and arbitration to the ears of men who are already satisfied to have peace and arbitration.

The patient attention, the manifest interest of the Tribunal, and the acute and instructive observations which have fallen from the lips of the members of the Tribunal during this argument cannot fail to inspire counsel with a strong desire to contribute something that may be useful to the attainment of a just judgment, as the result of so many and such arduous labours. I shall hope to contribute something. If I fail, it will be my misfortune, and not the fault of my intention.

The statement of the first question presents, in authentic form, the real attitude of the two nations in respect of its subject-matter. The form is unusual, peculiar. I have not seen it employed in the presentation of questions to arbitral tribunals.

I will read the article of the treaty to which the question relates, and the question itself.

The article is:—

#### “ARTICLE I.

“Whereas differences have arisen respecting the Liberty claimed by the United States for the Inhabitants thereof, to take, dry and cure Fish on Certain Coasts, Bays, Harbours and Creeks of his Britannic Majesty’s Dominions in America, it is agreed between the High Contracting Parties, that the Inhabitants of the said United States shall have forever, in common with the Subjects of His Britannic Majesty, the Liberty to take Fish of every kind on that part of the Southern Coast of Newfoundland which extends from Cape Ray to the Rameau Islands, on the Western and Northern Coast of Newfoundland, from the said Cape Ray to the Quirpon Islands, on the shores of the Magdalen Islands, and also on the Coasts, Bays, Harbours, and Creeks from Mount Joly on the Southern Coast

1168 of Labrador, to and through the Straits of Belleisle and thence Northwardly indefinitely along the Coast, without prejudice however, to any of the exclusive Rights of the Hudson Bay Company; and that the American Fishermen shall also have the liberty forever, to dry and cure Fish in any of the unsettled Bays, Harbours, and Creeks of the Southern part of the Coast of Newfoundland hereabove described, and of the Coast of Labrador; but so soon as the same, or any Portion thereof, shall be settled, it shall not be lawful for the said Fishermen to dry or cure Fish at such Portion so settled, without previous agreement for such purpose with the Inhabitants, Proprietors, or Possessors of the ground. And the United States

hereby renounce forever, any liberty heretofore enjoyed or claimed by the Inhabitants thereof, to take, dry, or cure Fish on, or within three marine Miles of any of the Coasts, Bays, Creeks, or Harbours of His Britannic Majesty's Dominion in America not included within the above mentioned limits; provided, however, that the American Fishermen shall be admitted to enter such Bays or Harbours for the purpose of Shelter and of repairing Damages therein, of purchasing Wood, and of obtaining Water, and for no other purpose whatever. But they shall be under such restrictions as may be necessary to prevent their taking, drying or curing Fish therein, or in any other manner whatever abusing the Privileges hereby reserved to them."

The question is:—

"QUESTION ONE.

"To what extent are the following contentions or either of them justified?

"It is contended on the part of Great Britain that the exercise of the liberty to take fish referred to in the said article, which the inhabitants of the United States have forever in common with the subjects of His Britannic Majesty, is subject, without the consent of the United States, to reasonable regulation by Great Britain, Canada, or Newfoundland in the form of municipal laws, ordinances, or rules, as, for example, to regulations in respect of (1) the hours, days, or seasons when fish may be taken on the treaty coasts; (2) the method, means and implements to be used in the taking of fish or in the carrying on of fishing operations on such coasts; (3) any other matters of similar character relating to fishing; such regulations being reasonable, as being, for instance—

"(a.) Appropriate or necessary for the protection and preservation of such fisheries and the exercise of the rights of British subjects therein and the liberty which by the said article 1 the inhabitants of the United States have therein in common with British subjects;

"(b.) Desirable on grounds of public order and morals;

"(c.) Equitable and fair as between local fishermen and the inhabitants of the United States exercising the said treaty liberty, and not so framed as to give unfairly an advantage to the former over the latter class.

"It is contended on the part of the United States that the exercise of such liberty is not subject to limitations or restraints by Great Britain, Canada, or Newfoundland in the form of municipal laws, ordinances, or regulations in respect of (1) the hours, days, or seasons when the inhabitants of the United States may take fish on the treaty coasts, or (2) the method, means, and implements used by them in taking fish or in carrying on fishing operations on such coasts, or (3) any other limitations or restraints of similar character—

"(a.) Unless they are appropriate and necessary for the protection and preservation of the common rights in such fisheries and the exercise thereof; and

"(b.) Unless they are reasonable in themselves and fair as between local fishermen and fishermen coming from the United States, and not so framed as to give an advantage to the former over the latter class; and



"(c.) Unless their appropriateness, necessity, reasonableness, and fairness be determined by the United States and Great Britain by common accord and the United States concurs in their enforcement."

The Tribunal will already have observed, of course, that instead of framing the question, the makers of the special agreement, the *compromis*, have stated separately the contention of each party, and have asked the Tribunal to say to what extent these contentions are justified. It may fairly be inferred that neither party to the agreement was willing to state the question in terms of the other's choosing; and that, therefore, there are two separate statements. An examination of the statement of the contentions indicates the reason. The two parties approached the subject of the first question from different points of view. Great Britain approached it from the standpoint of her sovereignty. The United States approached it from the standpoint of her granted right. Great Britain states the question as a question relating to the exercise of her sovereign rights. The United States states the question as relating to the inviolability of her granted right. And the two approaching the subject thus from different points, there comes a line between the two, and it rests with the Tribunal to draw that line.

At the outset of the consideration as to where that line is to be drawn, and how it is to be drawn, there is plainly to be seen one fact, unquestionable, agreed to on all hands: that the contention of the United States does not in any degree whatever thrust the assertion of its right into the field of British sovereignty in general. It does not question the full and unimpeded exercise of the sovereign rights of Great Britain over her territory, and the people within her 1169 territory, in all the general affairs of life. It does not question her control, without accountability, over the conduct of all persons who are within the spatial sphere of her sovereignty.

It is a familiar method of dealing with the arguments of an adversary to overstate them, for the purpose of destroying them; and when the claims of the United States are stated as being claims to an abdication of British sovereignty, I cannot help feeling that the statement trenches a little upon that method of argument. It constructs a man of straw, easily overthrown. It creates a certain degree of prejudice against the claim which, stated in such a form, is to remain during the period of a long argument characterized by such a description. We make no such claim. We admit unrestricted and unquestioned sovereignty by Great Britain over persons and their conduct; but our claim questions whether that sovereignty, since the grant to us, extends to a modification of our right. The American inhabitant who goes to the treaty coast for the exercise of his right is absolutely and in the fullest extent subject to the sovereignty of Great Britain; but what is his right? Can Great Britain change his

right? His conduct, in exercising the right, yes; he must obey the laws. But can it change his right? It is conceded—for certain purposes of argument asserted—asserted in the printed documents, asserted by the counsel for Great Britain here, and repeated over and over again, with emphasis, that there is a line beyond which Great Britain cannot go. Where is the line?

Let me call attention to three expressions as to the existence of the line beyond which Great Britain cannot go, which appear in the record, and which are progressively definitive. I will begin with the circular of Mr. Marcy, with which the Tribunal is very familiar, and which appears in the British Case Appendix at p. 207. The Tribunal will remember that Mr. Marcy, the American Secretary of State, upon the revival of the attempt to put into force the temporary and reciprocal treaty of 1854, issued a circular letter to the Collectors of Customs of the United States in which he said that there were certain acts of the colonial legislatures “intended to prevent the wanton destruction of the fish which frequent the coasts of the colonies and injuries to the fishing.”

And he said:—

“There is nothing in the Reciprocity Treaty between the United States and Great Britain which stipulates for the observance of these regulations by our fishermen; yet, as it is presumed, they have been framed with a view to prevent injuries to the fisheries, in which our fishermen now have an equal interest with those of Great Britain, it is deemed reasonable and desirable that both should pay a like respect to those regulations, which were designed to preserve and increase the productiveness and prosperity of the fisheries themselves. It is, consequently, earnestly recommended to our citizens to direct their proceedings accordingly.”

That was issued upon the submission to him of the statutes to which he refers, with a statement that they contained no provisions inconsistent with the full enjoyment of the American citizens' rights of fishing secured by the treaty. That statement appears in a series of preceding letters, notably the letter of Mr. Crampton to Mr. Mannors Sutton, which is to be found on pp. 205 and 206 of the British Case Appendix. It appears from this circular that Mr. Marcy, after examining these statutes, found nothing which he considered to be inconsistent with the full enjoyment of the American citizens' rights of fishing, and he approved the statutes and recommended their observance. Thereupon the British Minister represented to Mr. Marcy that a statement in his circular that there was nothing in the treaty which stipulated for the observance of these regulations would be apt to make trouble with the fishermen; that the American fishermen would not be likely to observe the recommendation which had been made to them, in the face of the statement that there was no stipulation requiring them to obey. That



representation appears in the letter of Mr. Crampton of the 25th April, 1856, which is to be found on p. 210 of the British Case Appendix. And the British Minister asked Mr. Marcy to amend his circular by putting in other words in place of the observation that there was no stipulation requiring obedience. These are the words that the British Minister wished included—I am reading from p. 211 of the British Case Appendix, the italicised words near the foot of the page:—

“American citizens would indeed, within British jurisdiction, be liable equally with British subjects to the penalties prescribed by law for a wilful infraction of such regulations, but nevertheless should these be so framed or executed as to make any discrimination in favour of the British fishermen or to impair the rights secured to American fishermen by the Reciprocity Treaty, those injuriously affected by them will appeal to this Government for redress.”

Mr. Marcy apparently declined to substitute those words for his own. At all events, he did not substitute them, but instead  
1170 of that he put in a statement, which is the first example of the drawing of the line between what Great Britain could do and what Great Britain could not do, to which I ask your attention. What he put into his circular, in place of the denial of his own first circular, and in the place of the declaration of binding obligation which the British Minister wanted to put in, was: first, a statement of this very general jurisdiction, general sovereign right of Great Britain to which I have already referred; and, secondly, a statement of the limitation in regard to the treaty. What he said was—and I now read from the final circular, on p. 209 of the British Appendix:—

“By granting the mutual use of the inshore fisheries neither party has yielded its right to civil jurisdiction over a marine league along its coast. Its laws are as obligatory upon the citizens or subjects of the other as upon its own.”

To that proposition we fully subscribe, with the addition which he makes of the particular situation in which the treaty places laws relating to the subject-matter of the treaty. That addition was in these words:—

“The laws of the British Provinces not in conflict with the provisions of the Reciprocity Treaty would be as binding upon citizens of the United States within that jurisdiction as upon British subjects.”

There is the first statement. It is first in point of being general, and it is first historically. General jurisdiction untouched; laws of the jurisdiction binding upon American citizens as fully as upon British subjects; laws not inconsistent with the treaty, binding; laws that are inconsistent with the treaty, not binding.

But Mr. Marcy does not undertake to point out, indeed the situation did not call upon him to point out, what laws would be consistent and what laws would be inconsistent with the treaty.

I now beg to pass to a second instance which proceeded somewhat further in drawing the line, and that is the letter of Lord Salisbury, to which attention has so often been drawn, in his correspondence with Mr. Evarts regarding Fortune Bay.

THE PRESIDENT: May I ask you, Senator Root, whether you consider that the following sentences in this circular have no bearing upon the preceding sentences, the sentences:—

“Should they be so framed or executed as to make any discrimination in favour of the British fishermen, or to impair the rights secured to American fishermen by the Reciprocity Treaty, those injuriously affected by them will appeal to this Government for redress. In presenting complaints of this kind, should there be cause for doing so, they are requested to furnish the Department of State with a copy of the law or regulation which is alleged injuriously to affect their rights or to make an unfair discrimination”?

SENATOR ROOT: I do not consider, Mr. President, that they have any bearing at all upon the precise proposition which I am now presenting; that is to say, upon the existence of the line between what Great Britain can do and what she cannot do. But they do have a bearing upon another closely allied question, to which I shall turn my attention in a moment, and that is the procedure which should follow, and the method of determining, practically, the line, as matters stood before this submission, before the making of the treaty of arbitration, or this special agreement. They have a very important bearing upon that.

Lord Salisbury, the Tribunal will remember, became involved in a correspondence with Mr. Evarts regarding the claim of the United States for compensation for certain acts of violence which had been done to American fishermen in Fortune Bay by the British fishermen there. The claim having been made, the British Government answered it in the manner which is ordinarily used in dealing with mere claims, an answer not indicating special consideration, but such as would naturally come from the claims department of a Foreign Office, that this claim could not be allowed because the American fishermen who suffered the injury were guilty of three distinct violations of the laws of Newfoundland; that they were on shore when they had no right to be on shore; that they were in-barring herring when the law prohibited it; and that they were taking herring with a seine during the period between October and May, when the statute prohibited it. In response to that, Mr. Evarts called attention to the fact that these laws were, in his view, not binding upon American fishermen, and he said, in a letter of the 28th September, 1878, which



appears in the United States Case Appendix at p. 652, from which I read on p. 655:—

“In transmitting to you a copy of Captain Sullivan’s report, Lord Salisbury says: ‘You will perceive that the report in question appears to demonstrate conclusively that the United States fishermen on this occasion had committed three distinct breaches of the law.’

1171 “In this observation of Lord Salisbury, this government cannot fail to see a necessary implication that Her Majesty’s Government conceives that in the prosecution of the right of fishing accorded to the United States by Article XVIII of the treaty our fishermen are subject to the local regulations which govern the coast population of Newfoundland in their prosecution of their fishing industry, whatever those regulations may be, and whether enacted before or since the Treaty of Washington.”

And he said, in the third paragraph below the one which I have read:—

“It would not, under any circumstances, be admissible for one government to subject the persons, the property, and the interests of its fishermen to the unregulated regulation of another government upon the suggestion that such authority will not be oppressively or capriciously exercised, nor would any government accept as an adequate guaranty of the proper exercise of such authority over its citizens by a foreign government, that, presumptively, regulations would be uniform in their operation upon the subjects of both governments in similar case. If there are to be regulations of a common enjoyment, they must be authenticated by a common or joint authority.”

And he concluded his letter by some paragraphs which I will read from p. 657:—

“So grave a question, in its bearing upon the obligations of this Government under the treaty makes it necessary that the President should ask from Her Majesty’s Government a frank avowal or disavowal of the paramount authority of Provincial legislation to regulate the enjoyment by our people of the inshore fishery, which seems to be intimated, if not asserted, in Lord Salisbury’s note.

“Before the receipt of a reply from Her Majesty’s Government, it would be premature to consider what should be the course of this Government should this limitation upon the treaty privileges of the United States be insisted upon by the British Government as their construction of the treaty.”

In response to that plain challenge, Lord Salisbury proceeded to draw the line which, as I conceive, it is to be your function to draw. In his reply of the 7th November, 1878, United States Case Appendix, p. 657, he said, in a paragraph which I shall read from p. 658:—

“I hardly believe, however, that Mr. Evarts would in discussion adhere to the broad doctrine which some portion of his language would appear to convey, that no British authority has a right to pass any kind of laws binding Americans who are fishing in British waters; for if that contention be just, the same disability applies *a fortiori* to any other power, and the waters must be delivered over to anarchy.”

There he stated what I have stated, and what Mr. Marcy had stated, as to the general jurisdictional power of Great Britain over her colony.

And subsequently, Mr. Evarts, rather sharply, and with language which indicated that no such idea ought to be imputed to him or suggested as conceived by him, repudiated any such view.

Lord Salisbury went on to state the other side of the question. Having stated in this form what, clearly, Great Britain can do, and having been challenged in due form to make a frank avowal or disavowal of the paramount authority of provincial legislation to regulate the enjoyment by our people of the inshore fisheries, he proceeded to state what Great Britain cannot do:—

“On the other hand,” he said, “Her Majesty’s Government will readily admit—what is, indeed, self-evident—that British sovereignty, as regards those waters, is limited in its scope by the engagements of the treaty of Washington, which cannot be modified or affected by any municipal legislation.”

And, in his further correspondence, after arguing that Acts passed before the treaty was made did not come within this limitation, he supplemented his former statement in his letter of the 3rd April, 1880 (United States Case Appendix, p. 683), by a further statement which I read from that letter on p. 687:—

“Mr. Evarts will not require to be assured that Her Majesty’s Government, while unable to admit the contention of the United States Government on the present occasion, are fully sensible of the evils arising from any difference of opinion between the two governments in regard to the fishery rights of their respective subjects. They have always admitted the incompetence of the colonial or the imperial legislature to limit by subsequent legislation the advantages secured by treaty to the subjects of another power.”

It still remains, however, after the drawing of this line by Lord Salisbury declaring on the one hand what Great Britain clearly could do, and on the other hand, what Great Britain clearly could not do, to further define the position of the line beyond the generality of the terms used by Lord Salisbury. And, that further definition was made in the correspondence relating to the Newfoundland treaty legislation of 1873 and 1874.

1172 You will remember that the Treaty of Washington of 1871 provided that it should apply to Newfoundland, in case the Legislature of Newfoundland passed a law making it applicable, and they did pass a law in 1873. It appears in the British Case Appendix at p. 705, “An Act relating to the Treaty of Washington, 1871.” In the first article of that statute they include a proviso (p. 706):—

“Provided that such Laws, rules and regulations, relating to the time and manner of prosecuting the Fisheries on the Coasts of this Island, shall not be in any way affected by such suspension.”



A very definite claim, a distinct assertion:—

“Provided that such Laws, rules and regulations, relating to the time and manner of prosecuting the Fisheries on the Coasts of this Island, shall not be in any way affected by such suspension.”

When that was called to the attention of the American Government, Mr. Fish, the American Secretary of State, wrote a letter, dated the 25th June, 1873, which appears on p. 252 of the British Case Appendix, in which, concerning the Treaty of Washington, he said, as we say of this treaty of 1818:—

“The Treaty places no limitation of time, within the period during which the Articles relating to the fisheries are to remain in force, either upon the right of taking fish on the one hand, or of the exemption from duty of fish and fish oil (as mentioned therein).

“I regret, therefore, that the Act of the Legislature of Newfoundland, which reserves a right to restrict the American right of fishing within certain periods of the year, does not appear to be such consent on the part of the Colony of Newfoundland to the application of the stipulations and provisions of Articles 18 to 25 of the Treaty, as is contemplated by the Act of Congress to which you refer, and in accordance with which the Proclamation of the President is to issue.”

There Mr. Fish stated the proposition which we press upon you here. “The treaty places no limitation of time within the period during which the articles relating to the fisheries are to remain in force,” and “the Act which reserves a right to restrict the American right of fishing within certain periods of the year is not such a consent as is contemplated by the Act of Congress,” and so on.

That is supplemented by the conversation with Mr. Fish, reported by Sir Edward Thornton, the British Minister in Washington, in which he said on p. 253 of the British Case Appendix:—

“Mr. Fish replied that he could state confidentially his understanding that the jurisdiction gave the right of laying down reasonable police regulations, and that as a matter of course such regulations would be observed by all who fished in the waters in question;”

That is the general jurisdiction as I have stated it; as Mr. Marcy stated it; and as Lord Salisbury stated it;

“but ”—

He proceeded to say—

“the permission to fish granted by the treaty was accompanied by no restriction except so far as to define the localities in which the fishing was to be carried on.”

That is the basis.

And upon that the Legislature of Newfoundland passed a new enactment omitting the attempted reservation of the right to regulate in respect of the time and manner of fishing which had been de-

clared contrary to the treaty, and substituted in place of it their Act of the 28th March, 1874, which appears at p. 706 of the British Appendix, and which says the articles of the Treaty of Washington—"shall come into full force, operation and effect, in this Colony, so far as the same are applicable, and shall thenceforth so continue in full force, operation and effect, during the period mentioned in Article thirty-three of the said Treaty, recited in the Schedule to this Act, any law of this Colony to the contrary notwithstanding."

Both of these correspondences I shall refer to again for other purposes. I refer to them now with the sole purpose of attempting to give definition to the line which I conceive must be drawn between what it is competent for Great Britain to do in the exercise of her general sovereignty, and what it is incompetent for Great Britain to do in respect of the modification of our right.

Now, to return to the question which the President asked as to the concluding words of Mr. Marcy's circular advising the fishermen to appeal to their own Government in case they found discrimination or interference with their right.

1173 Of course it follows from the fact that Great Britain has the general right of sovereignty, and the general right to pass laws within that jurisdiction, that there may be, as Lord Salisbury justly observes, an inadvertent overstepping of the line. That is always possible, wherever you draw the line, and of course those lines are not to be passed upon by fishermen, the statutes are to be respected, and, as Mr. Marcy instructs the fishermen, appeal must be made to their own Government; as Lord Salisbury says in the letter to which I have referred, the subject is to be taken up by the Governments.

No one on the part of the United States has ever been so lost to all considerations of the way in which government must be conducted as to claim anything to the contrary of that.

Wherever there is doubt as to whether a law is within or not within the competency of the Government which has general sovereignty over the territory in which the law is to be applied, that doubt must be resolved in a decent and orderly manner, in accordance with the customs of nations, not by having individuals take the law into their own hands and say, I will obey or I will not obey. That is true, wherever the line is drawn.

But, there still remains the question, when the two Governments come to consider whether a law that has been passed does overstep the line of competency, where are they to find the line of competency, what rule are they to apply?

If you were to find, as I hope you will, that it is competent for Great Britain to make police regulations to control the conduct of persons within this territory, although it is not competent for her to



modify our right, or the rights which Americans go there to exercise, nevertheless there must always be a question, what is a police regulation? We have had a good illustration here, in this subject of net interference. That was referred to in some one of the American printed papers as not being a police regulation. Mr. Turner stated in his opening argument for the United States that he thought it was. Sir Robert Finlay said he thought it was. I agree with both of them that it is a police regulation; but suppose a fisherman in Newfoundland had been of the opinion that that was not a police regulation, it was not his business to determine his conduct according to his view: that is a matter the Government must consider: "Is it a police regulation?"

And so, wherever the line is drawn, the question as to which side of the line statutes fall must be raised, not by individuals, but by the Government whose rights may be or are alleged to be affected.

THE PRESIDENT: May I ask, Mr. Senator Root, would there be any difference in the decision of the question whether the laws have been overstepped in regard to this treaty, or in regard to any other treaty? Is this treaty in a peculiar situation or of a peculiar character in this respect?

SENATOR ROOT: I think, Mr. President, it belongs to a special class of treaties, and the considerations regarding it must proceed upon somewhat different principles from the treaties of any other class; and assigning to this treaty its proper place in the class to which I think it belongs will be the function of another portion of my argument.

Let me state what I think is the question involved in the drawing of this line.

Granted that all laws of a general character, controlling the conduct of men within the territory of Great Britain, are effective, binding, and, beyond objection by the United States, competent to be made upon the sole determination of Great Britain or her colony, without accountability to anyone whomsoever; granting that there is somewhere a line beyond which it is not competent for Great Britain to go, or beyond which she cannot rightfully go, because to go beyond it would be an invasion of the right granted to the United States in 1818; was the legal effect of the grant of 1818 to leave the determination as to where that line is to be drawn to the uncontrolled judgment of the grantor, either upon the grantor's consideration as to what would be a reasonable exercise of its sovereignty over the British Empire, or upon the grantor's consideration of what would be reasonable towards the grantee?

Or, was the legal effect of the grant to establish a right which by its own terms drew the line beyond which the grantor could not rightfully go with statutes modifying or restricting the right, or the ex-

ercise of the right, without consulting the grantee whose rights were to be affected?

I have said, in stating this question, that it was whether the line was to be drawn upon the uncontrolled judgment of the grantor, either upon what would be a proper exercise of the grantor's sovereignty over the British Empire, or upon what would be  
1174 reasonable towards the grantee, as coming under both heads, both branches, in both aspects, under the category of uncontrolled judgment.

It seems that no argument is necessary to sustain that.

I must, however, revert to the statement of the British contention, which appears to impose upon Great Britain in express terms the limitation of reasonableness.

That certainly does impose a limitation. And the limitation is the limitation of what is reasonable. It is, what *is* reasonable, what *is* appropriate or necessary for the protection and preservation of the fishery, what *is* desirable on grounds of public order and morals, what *is* equitable and fair as between local fishermen and the inhabitants of the United States, and so on. And so Sir Robert Finlay, in his most comprehensive and able argument, assumed it to be, at one point in the argument; for he says "it never has for one moment been contended by Great Britain that regulations of the kind indicated there giving a preference to British fishermen as against fishermen of the United States would be defensible. The liberty given by the treaty cannot be taken away by regulation, and Great Britain could not so contend; Great Britain never contended that regulations might be framed which would put the natives of the dominion concerned in a better position than the United States fishermen who have been admitted to share in the benefits of the fishery."

But, when the counsel for Great Britain are confronted by the manifest unfairness of having a right vested in us which cannot be affected or modified by any legislation or regulation on the part of the grantor of the right which is not reasonable, fair, appropriate, and necessary, and at the same time arrogating to the grantor the right itself alone to determine what is reasonable, fair, appropriate, and necessary, he seeks refuge from the consequence by the proposition which I will now read from the copy of his argument at p. 176:—

"It is not claimed for the British Government, or for the Colonial Governments, that they can determine the question whether any regulation is reasonable. All that they claim is the right to make reasonable regulations, and if the point is raised as to whether any regulation is reasonable or not, it is not for the Colonial Government, it is not for the British Government, it is not for the United States Government to determine whether that regulation is or is not reasonable. It is for this Tribunal, to which the parties can, if such a difference arises, come."



Where did the right stand before the year 1908?

What are you to adjudge the rights to be under the treaty of 1818?

Under any arbitration proceeding, in any determination which you may make under the Articles of this treaty following the ones submitting the question, in any determination which may be made under the rules of procedure which you may frame and which may possibly be accepted, or under the short form of procedure at The Hague, provided for by article 4, what must be the foundation but an ascertainment of the rights of the parties under the treaty of 1818, and a procedure based upon the award which determines those rights? And, in determining what those rights are under the treaty of 1818, of course you must proceed without any reference whatever to the fact that, recognising the inequity of their own position, recognising that that position would be revolting to the sense of justice of an international Tribunal, Great Britain has recourse to the fact that under this recent agreement a Tribunal may do what it would have been unjust for Great Britain to do, that is to say, to pass herself alone upon the rights in which another was equally interested, to be the judge in her own case.

Of course I need not argue that the assertion of such an uncontrolled right is in its legal effect wholly destructive of the limitation which is stated in the contention of Great Britain under the first question of the special agreement.

How does Great Britain arrive at the conclusion that, while the grant of 1818 limits the scope of sovereignty, excludes her from legislation which modifies or affects our right, she alone is entitled to be the judge as to what is desirable, appropriate, necessary, and fair for her purposes to lead to a modification and restriction and limitation of our right? She does it by appealing to her sovereignty. It is not because there is any fairness as between two common owners of a right, that one should be the judge of limitations and modifications to be imposed upon the right; she does it by an appeal to her sovereignty. It is because she is sovereign there.

I shall deal hereafter with the question as to whether there is any foundation for that appeal. I refer to it now, however, for the purpose of pointing to the practical effect of the ground on which she claims the right to decide. That is, the ground upon which she claims that she had the right to decide prior to the making of this special agreement, for the ninety years before the treaty of 1908 came into existence.

1175 What is the practical effect of Great Britain establishing her right to determine alone herself as to what limitations may and should be imposed upon our right, upon the ground of her sovereignty? Why, it is that the right granted to us is subject to her

right of sovereignty. And what is the scope of the right of sovereignty?

It is to do what she pleases. It is that she may, if she will, go to any length whatever in restricting, limiting, impeding, or practically destroying the right which has been granted, for there is no limitation upon the right of sovereignty, and whatever authority is to be inferred from that is an authority without limit.

Now, I have endeavoured to state what I think to be the attitude of the two parties in regard to Question One, and to draw from the record definitions, in so far as seems to be useful for the moment, as to what Great Britain can do and what Great Britain cannot do. It is my purpose, as best I may, first to dispose of certain rather narrow questions relating to the meaning of terms in the grant of 1818; second, to show the practical bearing of the decision of the first question on the substantial rights of the United States; third, to examine the nature of the right granted and the consequences and legal effect of that nature; fourth, to show the understanding and intent of the negotiators as to the meaning and effect of the article and the terms used in it; fifth, to show the construction that has been put upon the article of the treaty of 1818 in question by the parties—the construction that was put upon it for more than sixty years after it was made—and, sixth, to show the relations to this case, to this right created by this article, of the accepted rules of international law which have grown up in the consideration and treatment of cases embodying the same fundamental characteristics and having a generic relation to the grant of the right under the treaty of 1818, as I hope to make it plain to you.

*First*, as to the meaning of some of the terms in the Article. Fortunately, we have for our assistance in the elucidation of these terms at the outset the fact that this agreement was an agreement in settlement of an old controversy. It was a settlement of questions which arose under the former treaty of 1783, and the terms used, wherever there is any question, may be considered with all the light thrown upon them that comes from the terms of the former treaty, the negotiations and correspondence relating to it, the practice under it, and the evidence of understanding by the parties as to what that treaty meant.

Words are like those insects that take their colour from their surroundings. Half the misunderstanding in this world comes from the fact that the words that are spoken or written are conditioned in the mind that gives them forth by one set of thoughts and ideas, and they are conditioned in the mind of the hearer or reader by another set of thoughts and ideas, and even the simplest forms of expression are frequently quite open to mistake, unless the hearer or reader can get



some idea of what were the conditions in the brain from which the words come.

We are fortunate in having a clear guide to the solution of many of the questions which may arise regarding the words of this Article of the treaty of 1818. The first term used in the Article regarding which there has been a question is the word "liberty." I hesitate to refer to the case of *Wickham v. Hawker*, of which my learned friend Sir Robert Finlay thought so lightly, but I will, partly because during more than forty years' practice at the American Bar I have learned to have great respect and reverence for the decisions of those great English courts, and I should not like to see the utterances of Baron Parke allowed to rest in this Tribunal under the ignominy which seems to have been cast upon them; and partly because the case does present a use of the word "liberty" very illuminating for our purpose in getting at the meaning of the first article of the treaty of 1818. In turning to this case we find that there was a term used in the English law regarding a subject about which every English gentleman is perfectly familiar. It was the name of a particular class of rights. The liberty of fowling has been described, in the words of Baron Parke to be a *profit à prendre*. The liberty of fishing, he says, appear to be of the same nature. It implies that the person who takes the fish takes for his own benefit. It is a common of fishing. This case was decided in 1840. It cites the *Duchess of Norfolk's* case from the "Year Book," and it states what the law has been from the earliest, or from very early times in England. The liberties, that is a particular class of rights known to the English law, to Englishmen and to Americans in the year 1818, were interests in land, they were those particular kinds of interests classified as *profits à prendre*. They might be appurtenant when they were attached to another estate; they might be *en gros* when they were conferred upon an individual irrespective of his ownership of another estate. Therefore, the word meant a right which could be conveyed by deed, inheritable, giving to a man and to his heirs, no  
 1176 license, no mere privilege, no mere accommodation, no consent or acquiescence, but a right which passed out of a grantor to a grantee, and was then his and his heirs' if the grant so expressed.

I say that was known to every English gentleman and every American, for the subject was a subject most interesting, certainly most interesting to all men of the Anglo-Saxon race, something not left to lawyers alone as a matter of interest. Now, there was this distinction carried by the use of the word "liberty" which was not necessarily carried by the general word "right." The liberty came by grant from the general owner of the estate in which the fishing, the hawking, or the hunting was to take place. It implied that the grantee of the liberty had acquired it from the general owner.

When the treaty of 1783 came to be made, John Adams claimed that the United States was equal in title with Great Britain to the fisheries which, you will remember, he speaks of as being one whole fishery on the banks and coasts. Great Britain, willing to concede that the United States had, irrespective of any grant from her, the right to fish on the banks, in the Gulf of St. Lawrence, in other places in the sea, was unwilling to concede that the United States had, without a grant from her, the right to fish upon the coasts. At that time, the old vague claims to well-nigh universal control over the seas were beginning to fade away. The new idea of a protective right over a limited territorial zone had not yet become distinct, certain, and fixed; but Great Britain was willing to abandon her claims to exclude any other independent nation from the Banks of Newfoundland and from the Gulf of St. Lawrence, as she had so long sought to exclude, and with great success, France and Spain. She was willing to concede the right, and did concede the right, to the United States as an independent nation to use that fishery. But she insisted upon using in the grant of the right to fish on the coasts a word which connoted the acquisition of the right by the United States from her, and not as incident to the independence of the United States. That was very well explained by Lord Bathurst in his letter of the 30th October, 1815, which is found in the United States Case Appendix at p. 273. I will read a few words from the paragraph at the foot of p. 276. He said:—

“It is surely obvious that the word *right* is, throughout the treaty”——

That is, the treaty of 1783.

“used as applicable to what the United States were to enjoy, in virtue of a recognised independence; and the word *liberty* to what they were to enjoy, as concessions strictly dependant on the treaty itself.”

You will remember that, in some of these letters, there is a statement of one of the negotiators speaking of the word “right” as being displeasing to the English people in that relation because it would indicate that the United States did not get it from them but held it by original title as against them; not that the word “right” itself was unpleasant. There is no word, perhaps, so pleasing to the English ear as the word “right,” but it was because of the inference that would be drawn from its use. So the word “liberty” was applied to this particular kind of right that must come by grant from another. The same distinction is very well stated by Mr. Webster in that unfinished memorandum of which we have heard. I read from p. 526 of the United States Case Appendix. He says:—

“It is admitted that by these treaties,”——

That is, the preliminary treaty of 1782 and the treaty of 1783.



“the right of approaching immediately to, and using the shore for drying fish, is called a *liberty*, throughout this discussion it is important to keep up constantly the plain distinction between an acknowledged right, and a conceded *liberty*.”

The words were taken into the treaty of 1818 from the treaty of 1783, and they were taken into the treaty of 1783 from the French-English treaty of 1763. The treaty of 1763, United States Case Appendix, vol. i, p. 52, says:—

“The Subjects of France shall have the liberty of Fishing and Drying, on a part of the coasts of the Island of Newfoundland, such as is specified in Article XIII of the Treaty of Utrecht.”

The relations between these French treaties and the American Treaty of 1783 were very peculiar. You will remember that the two treaties—the one between Great Britain and France and the one between Great Britain and the United States—were made on the 3rd September, 1783. They ended a war in which France and the

United States were allies against Great Britain, and they were 1177 the product of a connected negotiation. The preamble of the treaty between Great Britain and the United States of the 3rd September, 1783, recites, p. 23 of the American Appendix:—

“And having for this desirable end ”—

That is, peace.

“already laid the foundation of peace and reconciliation, by the provisional articles, signed at Paris, on the 30th of Nov’r, 1782 by the commissioners empowered on each part, which articles were agreed to be inserted in and to constitute the treaty of peace proposed to be concluded between the Crown of Great Britain and the said United States, but which treaty was not to be concluded until terms of peace should be agreed upon between Great Britain and France, and His Britannic Majesty should be ready to conclude such treaty accordingly; and the treaty between Great Britain and France having since been concluded.”

So you have these two treaties interdependent, necessarily, because of the subject-matter, making a peace in which the two are allied against the third, in the same terms, made upon the same day and both treating of the subject of the fisheries, the treaty with France expressly continuing, with certain modifications, the rights, the liberty, granted in 1763, which continued, with certain modification, the right granted in 1713, and the same word used in the American treaty to describe the right granted, which was used in the French treaties to describe the right granted. I will not weary the court by arguing that in 1783, or in 1818, it was well known to the negotiators that the words “shall have the liberty to take fish” in the French treaty of 1763 conferred a right on France, that it was no mere acquiescence or temporary concession, or good-natured assent, but that it was the

grant of a right and of a right that France had been asserting with a degree of boldness and uncompromising insistence against Great Britain for three generations—for 105 years before this treaty of 1818 was made.

So it is quite clear that the word "liberty" was understood by the negotiators to be descriptive of a right, and whenever the representatives of the two countries come to use the word, in such circumstances that there is no occasion to make this discrimination as to the origin of the right, they use the two words interchangeably. If you look at the treaty of 1854, which is in the United States Case Appendix, p. 25, you will see in the first article that there was provision for the appointment of commissioners to settle the limits within which the liberty conferred by that treaty was to be exercised. The treaty of 1854, you will remember, conferred the liberty to take, cure, and dry fish, using the same words in the granting clause as the treaty of 1818. The 1st article of the treaty of 1854 provided for the appointment of commissioners to fix the limits within which the liberty was to be exercised, and if you will be kind enough to look at the foot of p. 26 of the United States Case Appendix you will see that the commissioners were directed to—

"make and subscribe a solemn declaration that they will impartially and carefully examine and decide, to the best of their judgment, and according to justice and equity, without fear, favour, or affection to their own country, upon all such places as are intended to be reserved and excluded from the common liberty of fishing under this and the next succeeding article."

Now, if you will look at the paragraph just above the middle of p. 27 you will see what these Commissioners were directed to do:—

"Such Commissioners shall proceed to examine the coasts of the North American provinces and of the United States, embraced within the provisions of the first and second articles of this treaty, and shall designate the places reserved by the said articles from the common right of fishing therein."

"Liberty" and "right" were regarded by both countries in making the treaties as interchangeable terms. Otherwise the Commissioners were to take oath to do one thing and they were required by the treaty to do another and quite a different thing. You will find the same interchangeable use of the words "right" and "liberty" in the treaty of 1871. I will call your attention to but one more use of the term and that was by the British negotiators of the treaty of 1818 themselves. In the British Case Appendix, p. 86, there is a letter from Messrs. Robinson and Goulburn to Lord Castlereagh, dated September. The letter contains internal evidence that it was written on the 17th September because it encloses copies of the protocol "of this day's conference." They speak of it as a protocol of this day's



conference, and if you look at the protocols you will see that they are protocols of the 17th September; so that, although this date is blank, you could, with absolute certainty, write in the date the 17th. These gentlemen are making a formal report—

“We have the honour to report to your Lordship that we had yesterday agreeably to appointment a further conference with the Commissioners of the United States”—

1178 And so forth. It tells of certain things which the United States Commissioners said, and then, in the paragraph at the top of p. 87, says:—

“They concluded their observations on the subject of the fishery by adverting to that part of the proposed article, in which the right to fish within the limits prescribed is conveyed permanently to the United States.”

I think that is all I want to trouble the Tribunal with upon the subject of the meaning of the word “liberty.”

THE PRESIDENT: Have you finished your argument upon this point?

SENATOR ROOT: I am entirely in the hands of the Tribunal. I think perhaps we might as well adjourn.

THE PRESIDENT: We shall be pleased to have you continue your argument upon this question to-day. I was under the impression that you had finished it.

SENATOR ROOT: I have finished in regard to this particular subject of the meaning of the word “liberty.”

THE PRESIDENT: The Court will adjourn until Thursday at 10 o'clock.

[Thereupon, at 4.30 o'clock p. m., the Tribunal adjourned until Thursday, the 4th August, 1910, at 10 o'clock a. m.]

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#### THIRTY-FIFTH DAY: THURSDAY, AUGUST 4, 1910.

The Tribunal met at 10 a. m.

THE PRESIDENT: Mr. Senator Root, will you kindly continue your address.

SENATOR ROOT, resuming: I wish to add a single observation as to what I said regarding the meaning of the word “liberty” before the adjournment.

In stating the meaning of the word as it was used in ordinary municipal affairs, I did not wish to be understood as contending, of course, that it would necessarily have the same effect when used internationally. I should not contend for any such proposition.

When, on the other hand, I stated that the term “shall have liberty” used in the treaty of 1783 and in the treaty of 1818, was

taken from the French-British treaty of 1763, I did mean to be understood as indicating that it would have the same meaning, especially in view of the peculiarly close and intimate relations between the treaties.

I now pass to the words "in common." I do not think there is much, if any, difference between the two sides as to the meaning of the term "in common." I think the difference is rather as to the legal effect of the use of the term in the combination of words which we find in this treaty.

The ordinary use of the term "in common" as an English term, is stated in the printed Argument of the United States, pp. 39 and 40. Examples are given, and no criticism has been made, that I observe, and no difference appears to exist between counsel upon the two sides.

The particular use of the term "in common" as opposed to "exclusive" in this treaty was a matter which had some antecedents, and some circumstances naturally pointing towards it.

In the United States Case Appendix you will find at p. 286 some observation by Mr. Adams contained in a letter to Lord Bathurst, dated the 22nd January, 1816. I read from just above the middle of the page:—

"By the British municipal laws, which were the laws of both nations, the property of a fishery is not necessarily in the proprietor of the soil where it is situated. The soil may belong to one individual, and the fishery to another. The right to the soil may be exclusive while the fishery may be free or held in common. And thus, while in the partition of the national possessions in North America, stipulated by the treaty of 1783, the jurisdiction over the shores washed by the waters where this fishery was placed was reserved to Great Britain, the fisheries themselves, and the accommodations essential to their prosecution were, by mutual compact, agreed to be continued in common."

1179 That letter was one of the series of letters passing between the two Governments that settled and defined the matter in controversy, which was settled, which was adjusted, by the treaty of 1818. It was one of the series of letters which exhibited in authentic form the positions taken by the two countries, and which were adjusted in that treaty of 1818. It is no casual remark. It is the formal statement of the pleadings of the parties in the controversy which came to settlement in the treaty. And this letter was in the hands of the negotiators on each side in the making of the treaty of 1818.

So that there was a formal statement on the American side of the view as to the relation of the parties under the treaty of 1818 as being the holders of the fishery "in common," and that was not dissented from, but was the general view.



If we turn to the British Counter-Case Appendix, at p. 71 we find Mr. Oswald, the chief negotiator of the treaty of 1783, and the preliminary treaty of 1782, writing to Mr. Townshend, his chief in the Foreign Office of Great Britain, under date of the 2nd October, 1783, adding a postscript:—

“Drying fish in Newfoundland, I find is to be claimed as a privilege in common, we being allowed the same on their shores.”

And on p. 78 there is a note in a letter from Mr. Jay to Mr. Livingston. Mr. Jay, you will remember, was one of the negotiators on the American side in the Treaty of Peace of 1783, and he writes home to Washington, under date of the 24th October, 1782, speaking of a conversation with M. Rayneval, the French negotiator:—

“He inquired” (that is, M. Rayneval) “what we demanded as to the fisheries. We answered that we insisted on enjoying a right in common to them with Great Britain.”

That was Mr. Jay’s conception of what was demanded and what was received by the Americans in the treaty of 1783, corresponding precisely to Mr. Adams’ statement of it in his letter in 1816 to Lord Bathurst.

In the same British Counter-Case Appendix at p. 110 there is a letter dated the 4th December, 1782, from Count de Vergennes to M. de Rayneval. At the beginning of the very last line on p. 110, and running on to the top of p. 111, it says:—

“The perusals of the preliminaries of the Americans will make you feel how important it is that their concessions should be free from ambiguity in respect to the exclusive exercise of our rights of fishing.”

The French right of fishing. He proceeds:—

“The Americans acquiring the right to fish in common with the English fishermen, they should have no occasion or pretext for troubling us.”

Near the very beginning of the British Argument, p. 6, Great Britain cites a paper which was interposed by Mr. Rush in the negotiations with Great Britain which followed the French interference with American rights on the coast in 1820, 1821, and 1822, in which Mr. Rush refers to the French right of fishing on the coast as being a right in common, and that view was the view always taken by the British regarding the French rights of fishing on that coast, always denied by the French, always asserted by the British.

JUDGE GRAY: Mr. Root, in order that I may fully understand your position, your contention is that the use of the words “in common” in the citations that you have just made from M. Rayneval and Comte de Vergennes, was such as to contradistinguish it, in those instances, to exclusiveness.

SENATOR ROOT: Précisely, Sir.

THE PRESIDENT: Please, Mr. Root, do not some of these quotations (not all), but some of them, apply to the first draft of the treaty of 1782 or 1783, in which it was said:—

“That the subjects of His Britannic Majesty and the people of the said United States shall continue to enjoy unmolested the right.”

And so on, and at the end of that passage:—

“And His Britannic Majesty and the said United States will extend equal privileges and hospitality to each other’s fishermen as to their own”?

In this draft there was considered a reciprocity which, at a later stage, was omitted. Now, perhaps some of these quotations refer to this suggestion of a considered reciprocity?

1180 SENATOR ROOT: That may be, Mr. President. For the purpose of my present contention that would not make any difference. What I am endeavouring to point out is that “in common,” which is inserted in this treaty of 1818, was a phrase which had been customarily used in describing the non-exclusive character of the rights which were negotiated about, granted, and exercised under these previous treaties, so that it was a natural use of terms. When they talked about the fishery right that was being negotiated in 1782, they talked about, and wrote about it as being a right in common, and whether it was in the same terms as the final draft or not, they were using that expression to indicate that thing. That is precisely the point.

I do not conceive that it is necessary to argue that the right under the final treaty of 1783 was, in fact, a right “in common,” because the undisputed practice of the two countries treated it as a right “in common,” and the references upon both sides to it as being a right in common leave that beyond dispute. I am addressing myself now to the meaning of the words “in common,” and showing that the term had a customary use prior to its being put into the treaty of 1818 as excluding the idea of exclusiveness.

SIR CHARLES FITZPATRICK: That is to say, if that word had not been used, it was conceivable that the treaty might be so construed as to be an exclusive grant to the Americans?

SENATOR ROOT: Of course it is conceivable, but I do not, by saying that it is conceivable, mean that it could properly have been so considered.

SIR CHARLES FITZPATRICK: That is not your argument?

SENATOR ROOT: Not at all.

I think that Sir Robert made a very just observation when he said that the meaning would have been the same without the words “in common.” I think that without those words that the right was “in common” would have been implied, and that the insertion of the



words "in common" merely expressed what would have been implied.

SIR CHARLES FITZPATRICK: And therefore it does not exclude the idea of exclusiveness, to use your own words?

SENATOR ROOT: It does. It expresses the negation of exclusiveness, instead of leaving that negation to implication. While it is the plain and ordinary use of the words, it is not necessary to look far for the reason why it was expressed instead of being left to implication; I think it is easy to find it.

The French right which the British had always contended to be "in common," a right "in common" and not exclusive, had been asserted by the French to be exclusive and not "in common," and I beg you to observe that that assertion by the French did not depend upon any Declaration of 1783, it depended upon the terms of the Treaty of Utrecht and the treaty of 1763, which used the precise words of the treaty of 1783 and the treaty of 1818. The assertion of exclusiveness was prior to the making of the treaty of 1783, in which both Americans and French and English were all concerned. It was upon the basis of the grant of the treaty of 1763 which says "the subjects of France shall have the liberty of fishing." The same words. Upon that the French asserted an exclusive and not a common right, and the United States in their treaty of 1778 with France, made five years before the Declaration of 1783, had assented to that exclusive interpretation. So that Great Britain, making this new treaty of 1818, was using words of grant which had been interpreted by France as granting an exclusive right, and which had received the assent of the United States, so far as the French were concerned, as granting an exclusive right.

Now, in view of what we have seen here of the possibilities of new and varied constructions presenting themselves to the human mind in the course of years, when contemplating the treaty, it was but ordinary prudence that it should occur to some British negotiator that they had better put in an expression of the common right, rather than leave it to implication, which in regard to the very same words had been denied by the French with the assent of the Americans.

It may be, I think it is quite probable, there was another motive urging them. Of course, it is but conjecture. But, in the treaty of 1783, the British included a phrase which saved them from ever being charged with having undertaken to grant away a second time rights that they had granted to the French.

Their grant in 1783 was in regard to Newfoundland to take fish of every kind "on such parts of the coast of Newfoundland as British fishermen shall use." Now, that saved them from any controversy on the part of the French claiming that the British had undertaken to sell what was not theirs, and on the part of the 1181 Americans from any claim that the British had sold some-

thing that they did not have, which they had already sold to the French.

It would seem quite natural that in framing the treaty of 1818, when they came to substitute definite limits on the Newfoundland coast for the description of such parts as British fishermen should use, thus dropping out that safeguard against the French, and when instead of saying "such part . . . as British fishermen shall use," they said, "you may go from the Quirpon Islands to Cape Ray," it should occur to them before they finished, that they had dropped out that element of protection against the French; and the words, "in common with British fishermen" may well have been inserted in order to save them from interference with the French right of fishing. So that if the French fishermen were in fact entitled, or if it should turn out that France could maintain her right to exclusiveness under her treaty, the American right should not go beyond the right that the British in fact had.

There is a certain support for that view, not merely in the natural disposition that men would have to protect themselves, but in the negotiations of 1824.

You will remember after the French had warned the Americans off the coast of Newfoundland, there was a claim made by the United States to which reference has already been made. The claim runs in this way, in words that have already been read to the Tribunal, and I will not ask you to turn to them again, on the part of the United States:—

"It is obvious that if Great Britain cannot make good the title which the United States hold under her to take fish on the western coast of Newfoundland, it will rest with her to indemnify them for the loss."

And, upon that, in the negotiations which included some other things, in 1824 there was a protocol which appears on p. 126 of the United States Counter-Case Appendix. It is the very last paragraph on that page:—

"The citizens of the United States were clearly entitled, under the convention of October, 1818, to a participation with his Majesty's subjects in certain fishing liberties on the coasts of Newfoundland; the Government of the United States might, therefore, require a declaration of the extent of those liberties as enjoyed by British subjects under any limitations prescribed by treaty with other powers, and protection in the exercise of the liberties so limited, in common with British subjects, within the jurisdiction of his Majesty as sovereign of the island of Newfoundland; "

I do not know of anything in the treaty which would justify that statement unless it be the words "in common." I think the words "in common" do justify it. It is an important part of the treaty. There is the limitation upon the right granted, the limit upon the



right possessed by Great Britain, and that is of importance in determining what the right is. So I think it is fair to infer that that purpose may have led to the insertion of these words.

So much for the meaning of "in common," which is all I am addressing myself to now, and not to the legal effect of the words in combination with the other words of this article. The words have an ordinary, natural, undisputed significance as negating exclusion and carrying into the right granted the limits of the rights possessed by the grantor; the first, certainly, because that is the use that the parties had been making of the phrase in writing and speaking about the subject; and the second, possibly, perhaps probably, because it was natural in view of the situation in which the grantor nation was.

I pass to the meaning of the word "inhabitants." Some point has been made about that. I think it is used as an equivalent for "subjects" or "citizens," in a general way, as indicating the great body of human beings who make up the organised civil society called the United States. There was a rational explanation for the use of the term "inhabitants" instead of "subjects" or "citizens." Of course it was taken into the treaty of 1818 from the treaty of 1783 and the preliminary articles of 1782. In 1782 the relations of the individuals to the organised civil society were quite vague and unsettled. Men were very much accustomed to group the members of the different divisions of an empire or kingdom under the head of subjects. The person of the sovereign was the nexus. In 1782 they were cutting off the head of this organised society in which the King of Great Britain had united the people living in these thirteen colonies, the people living in the British Islands and the people living in the northern colonies in America, and they had not quite settled how the relations between the individuals should be described in lieu of describing them as subjects of this King who was no longer uniting them. In the articles of Confederation, which appear in the British Counter-Case Appendix, p. 7, you will see that uncertainty:—

"Articles of Confederation and Perpetual Union between the States of New Hampshire, Massachusetts Bay,"—

1181 And so forth. The date is the 9th July, 1778.

"Article I. The style of this confederacy shall be, 'the United States of America.'

"Art. II. Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this confederation expressly delegated to the United States in Congress assembled.

"Art. IV. The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all the privileges and immunities of free citizens in the several States."

Then the articles go on to put into the United States of America the entire treaty-making power, making the United States sovereign internationally. But you will perceive that there rather the dominant idea was that citizenship was citizenship of the several states, and that the relation to the international organisation was that of the inhabitants of the country who were citizens of the several states.

Indeed, they had little to guide them. You go back to the Roman State and citizenship; the privilege of *civis Romanus sum* related but to the little town on the banks of the Tiber rather than to the great world-wide political organisation, and vast numbers of people—the great majority of the people who really made up the political organisation of the Roman Empire—had no privileges of citizenship. Go farther back, to the Greeks, and there was no such thing as citizenship of the Achæan League or the Delian Confederacy; and people then were very much in the habit of thinking about what they had done in Rome and Greece. They were trying to work out a theory of government, of association, without a sovereign, and about the best models they could get were those drawn from classical precedents.

Now a type has emerged. When, in 1787, the people in the United States came to make a new constitution, they found that this loosely compacted organisation, in which municipal sovereignty was deemed everything, was too weak, and that they must make a stronger central sovereign, and from that came the type of national sovereignty, national citizenship. But they had not reached that point then, and so they used a comprehensive word which went just as far as their conception of organisation had gone, endeavouring to cover the same idea which would have described the people of Austria and Hungary as subjects of Francis Joseph, and which would have described the people of Scotland, England and Wales, and Berwick-on-Tweed as subjects of His Majesty King George.

I will call your attention to the fact that when these negotiators of 1824 met to make a formal protocol about the rights of the United States under the treaty of 1818, the protocol I have just referred to, they said, "The citizens of the United States were clearly entitled under the convention of October 1818," &c. That was signed by Mr. Rush, one of the negotiators of 1818, and Mr. Huskisson and Mr. Stratford Canning, who were most skilful and fully informed negotiators, on the part of Great Britain, and it shows that they regarded the terms as being convertible.

THE PRESIDENT: Would it be possible to say, having reference to article 4 of the Articles of Confederation, that in the sense of the treaty of 1818, only the citizens of the thirteen States were to be considered as inhabitants of the United States? Then the concept of



"inhabitants of the United States" would be identical with the concept of citizens of one of the thirteen States; or, notwithstanding this article 4, and notwithstanding the protocol you have just referred to, would the concept of "inhabitants of the United States" be a larger one than the concept of the citizens of the thirteen States?

SENATOR ROOT: I should think that there was no idea of limitation to the citizens of the thirteen States, for several reasons. In the first place, it was well known that in 1783 the territory which was included within the boundaries then established by that treaty covered a vast area not included within the limits of the original States. The inhabitants of the United States, or the inhabitants who were to have this right, included a great area not strictly within the State limits. It was property held under the rights of the different States and ceded to the United States. Then, when you come to 1818, there had already been an enormous enlargement beyond that. Louisiana had been purchased in 1803, and there was the great Louisiana territory and the north-west territory stretching out to the west with indefinite limits that no one knew, unsurveyed, to a great extent unexplored, being part of the territory of the United States, and the inhabitants of those different States all pushing out into it. Then it is of the nature of a State to change its territories, and the loosely com-  
1183 pacted organisation of 1778, which existed when the 1783 treaty was made, had disappeared in 1818, and there was this closely compacted Empire whose citizens were quite independent of residence in one State or another and had scattered widely over this great area. So I hardly think that we can find any limitation to a specific territory.

THE PRESIDENT: So that, in 1818, the term "inhabitants of the United States" embraced also persons who were not citizens of one of the different States if they had a residence in the territory of the United States?

SENATOR ROOT: Yes.

DR. DRAGO: May I draw your attention to the fact that in the Treaty of Peace of 1783, article 3, the words "people of the United States" and "inhabitants of the United States" are used as convertible terms.

SENATOR ROOT: That is true.

DR. DRAGO: Article 3 says that—

"the People of the United States shall continue to enjoy unmolested the right to take Fish of every kind."

It further says:—

"And also that the inhabitants of the United States shall have liberty to take fish of every kind."

"the Inhabitants of both Countries."

shall have the liberty to take fish, &c., and then proceeds:—

“the Inhabitants of the United States shall have liberty to take fish of every kind,” &c.

You can see that all these denominations are used as equivalent terms.

SENATOR ROOT: There is a third—“that the American fishermen shall have liberty to dry and cure fish.”

DR. DRAGO: Yes. So that we have here that the “people of the United States” shall have liberty to take fish, then the “inhabitants of the United States” shall have liberty to take fish, and, in the third place, “the American fishermen” shall have liberty to dry and cure fish.

SENATOR ROOT: I think that supports the view that I have taken that these were interchangeable terms.

THE PRESIDENT: Have all these terms the same significance as being expressive of an identical idea, or do they express different purposes?

SENATOR ROOT: I think they have the same subject-matter, but it was viewed from different aspects. I think that when they say “people of the United States” they are thinking rather of the right which came by virtue of independence.

JUDGE GRAY: A sovereign right?

SENATOR ROOT: The right which appertained to a sovereign independent State. I think that when they were speaking about the “inhabitants of the United States” they were thinking rather of how the right which they were granting to the United States was to be exercised by individuals, as a business enterprise that individuals must enter upon. And when they spoke of “American fishermen” they had reference to the method by which the right was to be exercised—that is by vessel.

SIR CHARLES FITZPATRICK: Only a limited class of Americans would exercise the privilege, and that class would come under the description of American fishermen.

SENATOR ROOT: Well, that may be.

SIR CHARLES FITZPATRICK: They would be the only people who would require to land and dry fish?

SENATOR ROOT: Bankers, merchants, and clergymen would not be there. But they did, in fact, know that it would be the American fishermen, and when they were speaking about the practical exercise of the privilege they spoke about the people who would be there.

1184 SIR CHARLES FITZPATRICK: Each one of these words has a of the privilege they spoke about the people who would be there. clause gave a special meaning to each of these words.

SENATOR ROOT: I do not doubt that. Now, a further word about the meaning of “American fishermen.” Plainly it is a personification



of the vessel which is owned and manned by Americans, just as these British statutes which have been cited here so fully speak of vessels receiving bounties and of vessels carrying on the fishery. Take the Act of 1775, British Case Appendix, p. 545—I hardly think it is worth while to look it up, for it is a perfectly simple thing, but I will read from article 7:—

“All vessels fitted and cleared out as fishing ships in pursuance of this act”——

That is, the Act 10 & 11 Wm. III, having reference to Newfoundland—

“shall not be liable to any restraint or regulation with respect to days or hours of working.”

There is the ordinary personification of a ship. The vessels shall not be liable to any restraint or regulation. At p. 565 of the same British Case Appendix you will see that the Act of 1819, passed to put this treaty into effect, in the second article, provides—

“that if any such foreign ship, vessel or boat; or any persons on board thereof, shall be found fishing,” &c.

**THE PRESIDENT:** Does the term “inhabitants of the United States” embrace persons who are not citizens of the United States; or does it embrace also British subjects resident in the United States? Can a British subject, resident in the United States, be, under the terms of the treaty of 1818, an inhabitant of the United States?

**SENATOR ROOT:** I should think so. Ideas were then quite vague and indefinite about what was the connection between the great body of the people in the territory who made up the political organisation. Indeed, there are still States, portions of the United States, in which aliens have the right to vote.

**THE PRESIDENT:** If a British subject resident in the United States goes, under his treaty right as an inhabitant into British waters to fish, would he be entitled also to the privileges which the inhabitants of the United States have, and would he be exempt from British fishery legislation?

**SENATOR ROOT:** Mr. President, that opens a pretty wide field—a field upon which the Foreign Office of the United States and the Foreign Offices in most of the countries of Europe have been engaged in discussion for a good part of a century, as to the extent to which old allegiance may be thrown off and new taken on, and the effect of that change upon the rights and powers of control of the country of origin over the person.

**THE PRESIDENT:** You mean the Bancroft treaties?

**SENATOR ROOT:** Yes, and there have been a great many situations of this kind which have arisen. The problem still remains to a certain extent in discussing the question of military service. It still

remains in the discussion of the effect upon a Russian subject who goes to the United States and becomes naturalized, and then goes home to Russia. There it is a criminal offence and he can be punished still under their law, if they apply their law, for having gone away. I do not think that on the spur of the moment I could solve the question you ask, but, of course, these gentlemen, in making these treaties, were not thinking about questions of that kind. That whole subject was in a very vague and indefinite position at that time, whether the original bond of allegiance between the Government of Great Britain and one of its nationals would be so completely destroyed by his going to the United States and becoming an inhabitant that, when he returned, he would not be subject to the entire control of his original Government, and whether he could claim as a right under the treaty exemption from that control, are questions perhaps not easy of solution. It is quite clear he could claim no right whatever against the Government of Great Britain personally; no one could make any claim in respect of it except the Government of the United States. If the Government of the United States chose to assert to Great Britain that it had a right under this treaty to have that inhabitant, although a citizen of Great Britain, exercise certain rights, then the question would arise and it might be a difficult one.

One single word about the meaning of "bays, harbours, and creeks." I merely desire to make an observation regarding the ordinary use of the words as English words. It seems to me quite plain that the word "gulf" is used only to indicate very large indentations in the land—

the Gulf of Bothnia, the Gulf of Finland, the Gulf of Genoa,  
1185 the Gulf of St. Lawrence, the Gulf of Mexico. The word

"bays" seems to be used either for very large indentations, which might be called gulfs, or very small ones, there being a wide range. For instance, there are the Bay of Biscay and Hudson Bay, which might well be called gulfs; the Bay of New York, the Bay of Fundy, Conception Bay, the Bay of Chaleur, the Bay of Naples, the Bay of Rio, Bahia Blanca (in Argentina), Bahia Honda (in Cuba), Bahia (in Brazil), Bantry Bay, Bay of Islands, and Bonne Bay, all of which are less than 6 miles wide, and there is not a bay on the western coast of Newfoundland which is more than 6 miles wide, except St. George's Bay. All the bays out of which the Americans were ordered by the French on this occasion that has been referred to were bays less than 6 miles wide, except St. George's Bay—so I am instructed; I have not been there to measure them.

Let me now say something about the practical bearing of your decision on the profitable use of the treaty right. I shall make some observations regarding the course of legislation in Newfoundland. I wish to impress upon the Tribunal this disclaimer, that I do not say a single word of fault-finding with Newfoundland or its Govern-



ment. They are and have been for many years protecting their interests, which is very much the duty of the Government, and have been following the natural and commendable instincts of human nature in doing it. I find no fault with them. I am going to challenge a judge; I am going to put to the judgment of the Tribunal the question whether the Government of Newfoundland, constituted as it is, inspired by the motives that it has, can be properly a judge upon our rights, which are its burdens, and left to draw the line which was intended to be established by the grant of this treaty. And I am going to urge upon you that the result which is developed by the application of the British theory to this case up to this time is a powerful argument against the soundness of the theory and against the view, that the negotiators, in making the treaty, meant to have it construed as Great Britain now construes it.

I need not devote much time to urging upon the Tribunal the importance of the right. The Tribunal will remember that it was a *sine quâ non* of the Treaty of Peace. John Adams declared he would never put his hand to the treaty unless this fishery right was provided for. He, and with him Franklin and Jay, were willing to stake the issues of peace and war upon having that right. Adams says so; Strachey wrote home to London so; Oswald wrote home to London so; Fitzherbert wrote home to London so. Our friends on the other side minimise it. They think little of it. Of course that is their privilege. Probably it is their duty to take that view of it. But not so these men who established it. One thing about it our friends on the other side have said that is certainly true: the value of it was not for the few miserable herring to be taken upon the shore of Newfoundland, nor was it for the cod-fish, the chief value that could be taken along the headlands or along the south shore; nor was it for the other fish, the hake, the halibut, the sea-cows, the great variety of fish that could be taken along the coast of Newfoundland. The great value of it was the bank fishery. And old John Adams, who knew his subject well, for he himself had been a participator in the fishing, as he tells us here, spoke of it as being one fishery; and it was one fishery. Why? Because the bank fishery cannot be prosecuted without bait. The herring, the caplin, the squid, were the seed corn of the harvest of the sea, which made the livelihood and the prosperity of the New England coast, and which still do make its livelihood and its prosperity.

The value of the bank fishery is quite apparent, I think. I will refer the Tribunal to a single statement in our Counter-Case Appendix, at p. 554, where the British counsel at the Halifax discussion presented the results of what was undoubtedly a careful enquiry into the facts. I will read from just below the middle of p. 554. They said:—

"Secondly. There has also been conceded to the United States the enormous privilege of the use of the Newfoundland coast as a basis for the prosecution of those valuable fisheries in the deep sea on the banks of that island capable of unlimited development, and which development must necessarily take place to supply the demand of extended and extending markets. That the United States are alive to the importance of this fact, and appreciate the great value of this privilege, is evidenced by the number of valuable fishing-vessels already engaged in this branch of the fisheries."

That is to say, in 1877, and with the rights of the treaty of 1818 only. They said, further:—

"We are warranted in assuming the number at present so engaged as at least 300 sail, and that each vessel will annually take, at a moderate estimate, fish to the value of 10,000 dollars. The gross annual catch made by United States fishermen in this branch of their operations cannot, therefore, be valued at less than 3,000,000 dollars."

1186 That bait is an absolute necessity for the continuance of that important industry is also shown by the statements of these Halifax counsel. They said, at p. 551 of the same Counter-Case Appendix, beginning near the foot of the page:—

"It is impossible to offer more convincing testimony as to the value to United States fishermen of securing the right to use the coast of Newfoundland as a basis of operations for the bank fisheries than is contained in the declaration of one who has been for six years so occupied, sailing from the ports of Salem and Gloucester, in Massachusetts, and who declares that it is of the greatest importance to United States fishermen to procure from Newfoundland the bait necessary for those fisheries, and that such benefits can hardly be overestimated; that there will be, during the season of 1876, upwards of 200 United States vessels in Fortune Bay for bait, and that there will be upwards of 300 vessels from the United States engaged in the Grand Bank fishery; that owing to the great advantage of being able to run into Newfoundland for bait of different kinds, they are enabled to make four trips during the season."

Further down on the page, they said:—

"It is evident from the above considerations that not only are the United States fishermen almost entirely dependent on the bait supply from Newfoundland, now open to them for the successful prosecution of the Bank fisheries, but also that they are enabled, through the privileges conceded to them by the Treaty of Washington, to largely increase the number of their trips," &c.

But Sir Robert Bond himself has given evidence on that subject. I read from his speech of the 12th April, 1905, beginning near the foot of p. 447 of the United States Counter-Case Appendix:—

"I hold in my hand papers relating to Canada and Newfoundland, printed by order of the Canadian parliament in the session of 1892, and on page 28 of that report I find a letter addressed by C. Edwin Kaulbach, esq., to the Hon. Charles H. Tupper, minister of marine



and fisheries at Ottawa, under date 17th of April, 1890. This gentleman, who hails from Lunenburg, Nova Scotia, and who is a member of the Canadian parliament, wrote as follows in respect to the restrictions which the government of this colony had placed on Canadian vessels visiting our shores for bait in that year: 'Our men are in terrible straits to know what to do under these circumstances, as their bait for the Grand Bank for our summer trip is almost wholly obtained on the south side of Newfoundland. The Grand Bank has been the summer resort of our fishermen for many years, and from various bays on the south coast of Newfoundland their supply of bait has been drawn, these being much less of distance and a greater certainty of bait than Canadian waters. We have hitherto enjoyed the privilege of obtaining bait in Newfoundland to the fullest extent, paying only such internal fees and taxes as were proper. The result of the action of the Newfoundland government will be most disastrous, and one season alone will prove its dire effects on the fishing fleet of Nova Scotia and the shipyards now also so busy and prosperous.' "

It is after that that Sir Robert Bond made his declaration:—

" This communication is important evidence as to the value of the position we occupy as mistress of the northern seas so far as the fisheries are concerned. Herein was evidence that it is within the power of the legislature of this colony to make or mar our competitors to the North Atlantic fisheries. Here was evidence that by refusing or restricting the necessary bait supply we can bring our foreign competitors to realize their dependence upon us."

This record is full of reports and correspondence showing that the French had for their bank fishery depended upon the procurement of bait in Newfoundland, and disclosing attempts by the Newfoundlanders to prevent the French from getting it, with the constant prohibition on the part of the Government of Great Britain, which regarded the effect that it would have upon her relations with her neighbour across the Channel to cut off such an important supply.

Of course there is also an element of value in this fishery, in the cod-fishing on the coast of Labrador, which is a very great fishery; and for that bait is necessary for the Americans. The Newfoundlanders carry on trap fishing there. They are on shore, and they run their traps out. But our fishermen use bait; they use a bultow. Then there is, of course, the cod-fishing on the south coast, as Sir James Winter has told the Tribunal. There is also the winter herring fishery, which has a relation to the bank fishery in this: The bank fishery is a summer fishery. The ships leave the Massachusetts and Maine coasts at the very end of winter, the beginning of spring, the last of February or the first of March; and they go up to the banks, take as many fish as they can with the bait that they can carry and keep, and then they go to the nearest point to get bait, and back to the banks. When they have exhausted the supply of bait, which is limited not merely by carrying capacity, but by keeping

capacity, they go back again, and to and fro for bait. Even if bait were unlimited down on the Massachusetts coast, the long voyage for a sailing vessel to get it and back again would exhaust the time 1187 which they should spend in catching cod-fish. The bank season ends along in the autumn, and the vessels which are employed in it must either lie up, and the men employed in it sit idle, until the next spring, or some other occupation must be found. This winter herring fishery affords occupation for vessels and men during the off-season of the bank fishery, and so enables that fishery to be prosecuted profitably; and it has been of very material effect in making possible the profitable prosecution of the bank fishery.

There have been, in regard to these fishing rights in Newfoundland, two lines of action on the part of the Newfoundland Government, both constituting the expressions of a single policy: A line of legislation relating to the sale of bait, and a line of legislation regarding the taking of fish, both constituting but expressions of a single policy, which is the policy stated by Sir Robert Bond—the control of the bait supply, compelling competitors to recognize Newfoundland as “the mistress of the northern seas” in respect of fishing.

I shall ask the Tribunal to bear with me while I trace those two lines of action, begging the members of the Tribunal to keep in mind what I have said, that no one act is to be treated by itself; that neither line of action is to be taken by itself, but that the whole grand policy of Newfoundland is to be considered, and the separate acts are to be relegated to their proper positions under that policy.

The first consideration in tracing this policy is one which has frequently been referred to here in respect of the purchase of bait. Our fishermen would rather buy bait in Newfoundland than take it, and there are several reasons for that. The first natural reason is that they could better use their time catching cod-fish than in catching bait; and it is more convenient and inexpensive, either by purchase or employment, to have the Newfoundlanders provide them with the supply of bait, and to go on to the fishing fields, where they can spend their time taking cod-fish. And, as Sir James Winter tells us, they have always bought bait. There never was any practical limitation upon the buying of bait until the Bait Act of 1887, the first Bait Act, which merely prescribed a license, evincing a purpose to take into the hands of the Government control of the business of selling and buying bait. But the licenses were issued until 1905, when they were cut off. During all that long course of years a population grew up along the western and southern coast—a sterile coast, as you will see before long, selected for the locus of the grant to the United States in 1818 because it was sterile and afforded no invitation to population. A population grew up on the basis of the business of catching and selling bait to French and to Americans. It was their means of



livelihood. The quotations from the reports of Captain Anstruther, the British naval officer that Mr. Elder referred to, show what the situation was. The only money that these poor fellows on the coast ever got they got from the Americans. As Captain Anstruther says, what they had been doing before was to work under the trade or barter system, with such local business concerns as would buy from them. They would bring in their fish and get a credit, and buy a pair of boots, or an oiler, or molasses, or pork, and have it charged, and so on. The first money they ever got, and the only money they got, came from the Americans. But all that is in Captain Anstruther's report, and I shall not dwell on it. But a custom, a practice, and a population finding their means of livelihood from this trade had grown up on the treaty coast, until down came the axe in 1905 and cut that means off.

As an incident to the fact that these people, father and son, had come to live upon this industry or trade with the Americans, there came an assertion on their part of a right to take the fish themselves, and to profit by the industry; and that was the basis of the Fortune Bay difficulty. I will read from some of the affidavits about the Fortune Bay affair, in the United States Case Appendix, pp. 694 and 695.

The Tribunal will remember that after the Treaty of Washington was made, under which the United States, pursuant to the Halifax award, paid 5,500,000 dollars to Great Britain for the privilege of fishing, a lot of American fishing-vessels went into Fortune Bay to exercise the privilege, and they undertook to do so, and were prevented by the inhabitants. I read from p. 694 of the United States Appendix:—

“The examination of James Tharnell, of Anderson's Cove, Long Harbour, taken upon oath, and who saith:—

“‘I am a special constable for this neighbourhood.’”

That is, a special officer of Newfoundland at that point in Fortune Bay. I now read from the foot of p. 694, and over on to p. 695, what he says about the Fortune Bay affair:—

1188 “The people were not aware that it was illegal to set the seines that time of the year, and were only prompted to their act by the fact that it was Sunday. We all consider it to be the greatest loss to us for the Americans to bring those large seines to catch herring. The seines will hold 2,000 or 3,000 barrels of herring, and, if the soft weather continues, they are obliged to keep them in the seines for sometimes two or three weeks, until the frost comes, and by this means they deprive the poor fishermen of the bay of their chance of catching any with their small nets, and then, when they have secured a sufficient quantity of their own, they refused to buy of the natives.

“If the Americans had been allowed to secure all the herrings in the bay for themselves, which they could have done that day, they

would have filled all their vessels, and the neighboring fishermen would have lost all chance the following week-days. The people believe that they (the Americans) were acting illegally in thus robbing them of their fish."

On p. 699, I read from the affidavit of John Cluett, of Fortune Bay:—

"The Americans, by hauling herring that day when the Englishmen could not, were robbing them of their lawful and just chance of securing their share in them, and, further, had they secured all they had barred they could have, I believe, filled every vessel of theirs in the bay. They would have probably frightened the rest away, and it would have been useless for the English to stay, for the little left for them to take they could not have sold."

On p. 700, Charles Dagle, American master, says in his affidavit:—

"If I had been allowed the privilege guaranteed by the Washington Treaty, I could have loaded my vessel and all the American vessels could have loaded. The Newfoundland people are determined that the American fishermen shall not take herring on their shores. The American seines being very large and superior in every respect to the nets of the Newfoundlanders, they cannot compete with them."

And there was another affair which illustrates what I am now trying to make clear to the Tribunal, and that is that the Newfoundland fishermen came to deem that they had rights in this trade which the Americans ought not to interfere with by taking the fish themselves. In 1880 some American vessels undertook to take their own bait up in Conception Bay. That was while the Treaty of Washington was still in force. I will read from the affidavit of John Dago, on p. 715, at the foot of the page. He says he left Gloucester on the 1st April, 1880, then says:—

"On the 9th August, 1880, we went into a cove in Conception Bay, called Northard Bay, for squid. I put out four dories and attempted to catch my bait with the squid jigs or hooks used for that purpose."

Now, turning over to the top of p. 716 of the United States Case Appendix, I read:—

"My men went into the immediate vicinity of where the local shore boats were fishing for squid, but in a short time they returned and reported to me that they were not allowed to fish by the men on board the shore boats, and not wishing any trouble they returned on board. I then manned my lines on the vessel and commenced to catch squid; the men in the shore boats seeing us fishing came off to us to the number of sixteen boats, with some thirty men. These men demanded that I should stop fishing or leave, or else buy squid from them. They were very violent in their threats, and to avoid trouble I bought my squid, paying them one hundred and fifty dollars for the squid, which I could easily have taken if I had not been interfered with.



"Wherever I have been in Newfoundland I find the same spirit exists, and that it is impossible for any American vessel to avail herself of the privileges conferred by the Treaty of Washington."

There, on the same page, is an affidavit by Joseph Bowie, master of the American schooner "Victor." He went into Musquito, Newfoundland, three times for bait, he says, and bought capelin from the local fishermen. He continues, at the bottom of p. 716:—

"The next time I went to a place called Devil's Cove on the chart, but it is called Job's Cove by the people; this was on the 4th of August, and the only bait to be obtained was squid. I anchored in the cove about  $\frac{1}{4}$  of a mile from the shore, and commenced to catch squid with the common hooks or jigs used for that purpose. I had no nets or seines on my vessel. I had been fishing about 15 minutes when some sixty boats that had been fishing in-shore from us, manned by at least one hundred and fifty men, rowed up alongside of us and forbade our taking any squid."

THE PRESIDENT: If your please, Mr. Senator Root, where is this Musquito? Is that on the treaty coast or on the non-treaty coast?

SENATOR ROOT: I think it is not on the treaty coast. It was under the Treaty of Washington.

THE PRESIDENT: Oh, yes; under the Treaty of Washington.  
1189 SIR CHARLES FITZPATRICK: They were all treaty coast at that time.

THE PRESIDENT: Yes.

SENATOR ROOT: They appeared to have been in the habit of buying their bait until the Treaty of Washington came along, and there was all this talk about the value of the fishery, and the Halifax award had determined that we were to pay 5,500,000 dollars for the privilege of fishing. Apparently, then, the American vessels tried to fish, and this was the obstacle that they met from the local inhabitants.

This same affidavit goes on to say that the natives prevented their fishing, and finally they bought their bait and went their way.

JUDGE GRAY. Do you know, sir, as a matter of fact, whether, outside of the Treaty of Washington, when it was open, the Americans were in the habit of resorting to what would now be called the non-treaty waters to buy bait?

SENATOR ROOT. I think the indications are that they went to the most convenient port, treaty or non-treaty coast, to buy bait. The fishermen find out where they are most likely to get it, and they run into one place or another place, as the case may be. Sometimes it is very plentiful in one place, and then again the horn of plenty will be poured out in another direction. They go where they think they can get it. But so long as they were buying it, it made no difference

whether they were on treaty coast or non-treaty coast. That is not very definite, but that is my inference, from reading all this great mass of documents.

Now, *pari passu* with this practice of purchase which had been continued time out of mind, and under which the local population had come to conceive that they had rights against the substitution of taking for purchasing, there ran a series of shore protection statutes and executive acts. The first of that series to which I ask your attention is the denial to American fishermen of any shore rights whatever, under the treaty of 1818. They were denied back in 1839, by that opinion of the Law Officers of the Crown in which, like the Colossus of Rhodes, they fell off the headlands into the sea. They, being asked whether the American fishermen had any right to use the strand of the Magdalen Islands for the purpose of hauling their nets, answered No, with the admirable logic involved in the proposition that because the treaty granted American fishermen rights to go ashore on the south coast of Newfoundland to dry and cure their fish, therefore there was a necessary implication that they would not draw their nets on the strand of the Magdalen Islands. That opinion the Tribunal will find referred to many times afterwards in the correspondence. The Halifax British counsel stated what was considered to be the situation at p. 538 of the United States Counter-Case Appendix—the situation, I mean, as to American shore rights. I read now from just below the middle of p. 538, where they say:—

“The convention of 1818 entitled United States citizens to fish on the shores of the Magdalen Islands, but denied them the privilege of landing there. Without such permission the practical use of the inshore fisheries was impossible.”

I hope the Tribunal will observe the progressive effect of these different things which I am going to refer to, to the ultimate end of crowding us out of any opportunity of any benefit whatever under this treaty of 1818, the exercise of a right under which is the key to the great bank fishery. They said, in the last paragraph on p. 538:—

“In the case of the remaining portions of the sea-board of Canada, the terms of the Convention of 1818 debarred United States citizens from landing at any part for the pursuit of operations connected with fishing. This privilege is essential to the successful prosecution of both the inshore and deep-sea fisheries.”

Lord Salisbury, in a letter which has been much referred to, of the 3rd April, 1880, refers to the same subject. I read from p. 684 of the United States Case Appendix. That is in his correspondence with Mr. Evarts, in which they got down to an understanding, or supposed they got down to an understanding, as to what the rights of the parties were under the treaty, with the exception of certain definite



points on which they agreed to disagree. Lord Salisbury says there, just below the middle of the page:—

“Thus whilst absolute freedom in the matter of fishing in territorial waters is granted, the right to use the shore for four specified purposes alone is mentioned in the treaty articles, from which United States fishermen derive their privileges, namely, to purchase wood, to obtain water, to dry nets, and cure fish.

1190 “The citizens of the United States are thus by clear implication absolutely precluded from the use of the shore in the direct act of catching fish. This view was maintained in the strongest manner before the Halifax Commission,” &c.

And that statement of Lord Salisbury is based upon both the treaty of 1818 and the treaty of 1871. He has just referred to both of them as the basis of that conclusion.

Sir Robert Bond, in his speech of the 7th April, 1905, refers to the same subject, and reasserts the position.

It is true that this view that we were excluded from the shore was denied by Mr. Evarts, and that the United States has never assented to it; but it has been the practical treatment of the subject by Great Britain that she has denied to the United States any use of the shore; and, as a practical matter, any attempt to overcome that would be met by this insuperable, or practically insuperable, obstacle of the opposition of the shore population, so that the attention of American fishermen has been directed not to undertaking to get ashore and have a fight with the inhabitants, but to getting their bait in the best way they could. And so long as they could buy it, down to 1905, it was a matter of comparatively little consequence. When I come to discuss the British view of the inferences to be drawn from the fact that the fishing is in common, I am going to say something more about this question of shore rights. But what I have said serves my present purpose, which is to enumerate the successive steps by which the shore of Newfoundland was protected against us. The shore fishermen, in the exercise of their industry, protested against the foreigner coming there, and the foreigner was compelled to purchase until, in 1905, the right to purchase was cut off, and he found himself with this barrier against the exercise of the treaty right of taking fish standing before him, both being in pursuance of a general purpose to shut him out from getting bait which would enable him to compete with Newfoundlanders in the bank fishery.

The Tribunal will perceive that by itself this exclusion from the shore made it inevitable that the kind of fishery that the Americans prosecuted should be a different kind of fishery from that which the Newfoundlanders prosecuted. It made the necessary working of the industry such that it was aptly described by Mr. Evarts when he said that it was impossible that the rights of the strand fishermen

and the vessel fishermen should be turned over entirely to the determination of either one of them.

There was a series of statutes, I have said, and we have—

THE PRESIDENT: The exclusion from the shores of the Magdalen Islands was reported at the Halifax Commission by the United States agent himself?

SENATOR ROOT: Yes.

THE PRESIDENT: In the course of the argument.

SENATOR ROOT: Of course counsel there were dealing with a practical situation, and it was their tendency to minimise as much as possible what was coming from Great Britain.

THE PRESIDENT: Those tactics were observed on both sides.

SIR CHARLES FITZPATRICK: There was a tendency to exaggerate on one side and minimise on the other.

THE PRESIDENT: Yes.

SENATOR ROOT: As to all this long series of statutes, Sir James Winter has told us how they were made.

I turn to p. 3427 of the typewritten copy of his Argument [p. 568, *supra*], where he says:—

“Newfoundland has such legislation as it considers desirable, after having considered the matter most carefully, and after having had the experience and the opinion of the best qualified authorities in the country.”

That is in the country of Newfoundland. Then he proceeds, after an interval, to say:—

“Among other things, those who are entrusted with these powers and duties”——

That is, of legislation.

“have come to the conclusion that in certain places bultows are objectionable, that they have a bad effect upon the fishing operations of these localities, and the result is, without going into details, 1191 as has already been stated, at certain places which are marked on the maps, which I believe are being put in for the information of the Tribunal, these regulations against the use of bultows are in force.”

Let me observe that “bultow” is a corruption of the English word “bulter,”—a long line to which shorter lines with hooks and bait are attached. I saw one of them the other day out on the pier at Scheveningen, and there were a number of them there. I saw one of them drawn in from the sea. It had been carried out to a distance, and this long line stretched out into the water, and at intervals of a few inches only there were little short lines depending with hooks on them, that had been baited; and as the man drew it in, for the amusement of the people resorting there, there was a long row of



little lost soles hanging on to these short lines. That is the "bulter"—what they call in Newfoundland the "bultow"—a long line, which has short lines depending from it, with hooks and bait, and which is weighted down so as to run nearly to the bottom, and which is connected with a line at the surface which is buoyed up; and the vessel puts out these long lines, of tremendous length, almost as long as the drift nets that are used in the Holland and Scotch herring fisheries; they put these out, baited, and after they have been left there long enough for the fish to have taken their luncheon, the fishermen go round and draw the lines in and take the fish off.

The local fishermen in certain localities objecting to these bultows, Sir James says they prohibited the bultows in those localities. Over on p. 3431 of the record [p. 570 *supra*] Sir James says:—

"The same general observations that I have made about bultows apply to seining, with this exception, that there is more unanimity of opinion on the matter of seines than there is to bultows. The fact that bultows are prohibited in a number of places on the coast is because, on account of local circumstances, the reasons are different, and it is generally left to those who have the best information on these matters in each of the localities to decide and to help the legislators. It is generally upon their opinions and views that these regulations are made; in other words, they are made to suit the circumstances, views, and opinions of the people. It is a sort of what is called local option, and from this it results that the prohibition of bultows is not general or universal. But, it is different with seining."

There you have stated, upon unimpeachable authority, with great frankness, and an accuracy which is supported by a reading of this record, the way in which Newfoundland makes these regulations which Great Britain wishes you to say constitute and will constitute an adequate protection for the very rights that the local fishermen in these localities are seeking to protect themselves against.

Now, as to the specific statutes: In the first place, the legislation began with the Act of 1862, which the Tribunal will remember prohibited the taking of herring by seines between the 20th October and the following April:—

"That no person shall haul, catch, or take Herrings in any Seine, on or near any part of the Coast of this Island, or of its Dependencies on the Coast of Labrador, or in any of the Bays, Harbors, or any other places therein, at any time between the Twentieth day of October and the Twelfth day of April in any year."

I think there is satisfactory evidence in the case that that statute was passed with no idea of applying it to Americans. It is not very important, but I think that will be quite clear as I go on in developing certain facts under other heads. And they put into the statute, under Article 10:—

"Provided always, That nothing in this Act contained shall in any way affect or interfere with the rights and privileges granted by

Treaty to the Subjects or Citizens of any State or Power in amity with Her Majesty."

I must say, and I think the Tribunal will agree, that the legislature of Newfoundland in passing that statute considered that that saving clause excluded Americans from the purview of the Act. What it did was to put the prohibition down during the French off-season. I hope the Tribunal will understand what I mean by the "French off-season."

THE PRESIDENT: The season in which the French are not permitted to fish—the winter season?

SENATOR-ROOT: Yes; the season closes the 20th October.

THE PRESIDENT: Yes.

SENATOR ROOT: From the 20th October until the French come back again they put down this statute.

1192 THE PRESIDENT: Yes. One section begins with the 20th October, and the second section begins with the 20th December. The first section would coincide with the French off-season, whereas the second section would, perhaps, not totally coincide with it.

SENATOR ROOT: I do not know why they fixed those dates in this second section.

THE PRESIDENT. You do not know why the dates are fixed?

SENATOR ROOT: No, I do not. I merely observed that the first section did coincide with the period during which the French do not fish.

THE PRESIDENT: Yes.

SENATOR ROOT: It is a shore-protection statute, because it is limited to seines; and it is expressly provided that it shall not prevent the taking of herrings by nets, which is the natural and customary implement of the shore fishery—not necessarily exclusive, but the customary and ordinary implement of shore fishery. It would have excluded Canadians and it would exclude from the shore fishermen, Newfoundlanders, coming from other parts of the country. Such is the nature of fishermen that they do not like to have their own local fishing interfered with by anybody. He may be friend and brother, but they want their own fishing for themselves; and this is a shore-protection statute. As I go on with these I am not going to contend that they had specific interference with the American right in their minds in passing each of these statutes. In some of them later I think they included American rights in what they meant to exclude, to bar out; but they are following, in all this series of statutes, the natural impulse of mankind, of fishermankind, to protect their own fishing at their own doors. It is the same impulse that every boy has about the stream that runs through his father's farm; and it is an impulse that is inevitable, and not at all discreditable.

The next statute that I would like to bring to the attention of the Tribunal is the provision which now exists as section 25 of the regu-



lations of 1908. My reference to it is in the United States Appendix, p. 202.

JUDGE GRAY: The last statute was in 1862, about?

SENATOR ROOT: Yes; and that was continued along and included in the consolidated statutes of 1872, and along in the second consolidation of 1892, and this provision I am about to refer to comes down from previous acts of legislation; but the most convenient form in which to find it is in this provision in the 1908 regulations.

The 1908 regulations were a reprint in this respect, and in most respects, merely of regulations of previous years. It was rather an edition than a new set of regulations. It is a new 1908 edition of long-standing regulations.

The provision is:—

“No herring seine or herring trap shall be used for the purpose of taking herring on that part of the coast from Cape La Hune on the West Coast, and running by the west and north through the Straits of Belle Isle to Cape John.”

Now, here is Cape La Hune in here (indicating on map) just about 20 miles east of the Ramea Islands; and this stretch takes in the whole of the American treaty coast, the south and the west, and runs down to Cape St. John down here somewhere, which is the end of the French treaty coast. So that it includes the whole American treaty coast, and the whole French coast, and about 20 miles in addition. That is a clear shore protection statute. It would not be so singular if it did not omit the great stretch of the free fishing coast of Newfoundland, imposing no limitation to the taking of herring by the seine anywhere in these great herring bays, Fortune and Placentia, or upon any of the great fishing coast of the east side.

THE PRESIDENT: What other means of taking herring would be permitted on that part of the coast?

SENATOR ROOT: Nets.

THE PRESIDENT: Are nets used principally by the inhabitants?

SENATOR ROOT: Principally by the inhabitants; yes; that is the principal implement used by the inhabitants.

THE PRESIDENT: By Newfoundlanders?

SENATOR ROOT: Yes.

1193 But this provision does not stand alone. Under the heading “Herring Fishery,” on p. 202, first paragraph, is:—

“Herring may be caught in nets or hauled in seines, and other contrivances, under the conditions and in the manner prescribed by these rules, and not otherwise.

“No herring trap shall be used in the waters of the district of Placentia and St. Mary’s or Fortune Bay.”

And so on. But there still exists, and existed when these regulations were made, the Act of 1884, which provided that Newfoundlanders,

for purposes of bank fishing, might take herring at any time and in any manner, "notwithstanding any law to the contrary" (p. 709 of the British Case Appendix):—

"Notwithstanding any law to the contrary, it shall be lawful for the owner of any vessel owned and registered in this Colony, which shall be fully fitted out, supplied and ready to prosecute the Bank fishery, and shall have obtained a Customs Clearance for the said fishery to haul, catch, and take herring, at any time and by any means, except by in barring or enclosing such herring in a cove, inlet, or other place, to an extent not exceeding sixty barrels for any one voyage, to be used as bait in prosecuting the said Bank fishery in the said vessel."

Now Sir James Winter explained that very frankly as being called for by the necessities of the Newfoundland bank fishermen. They had to have bait, and accordingly here was the statute authorising them to take bait—no seine limitation, no Sunday limitation—"any law to the contrary notwithstanding." Newfoundland bank fishermen may take their bait as best they can, and when they can.

Yet upon the full length of the treaty coast no one but a Newfoundland fisherman is at liberty to take bait with a seine or herring trap. Everywhere off the treaty coast, Newfoundlanders can take herring for any purpose, with herring traps and herring seines, if they see fit. And everywhere—treaty coasts or non-treaty coasts—Newfoundlanders engaged in the bank fishing may take their bait.

Now, there is a shore protection statute—a statute for the protection of Newfoundland fishermen against all the world. I do not know that they had Americans particularly in view in that discrimination which they made, but the fact that they did include the whole American treaty coast in this prohibition would seem to indicate it. They certainly meant to stand for Newfoundland fishermen against all the rest of mankind; and they did it, and they did it effectively if the British theory be true that the grant of the treaty of 1818 to the United States is subject to the British right of legislation.

The Sunday provision, introduced in 1876, is another illustration. It was not religious fervour; because it did not prohibit the taking of cod-fish, and cod-fish is the great industry of Newfoundland. The great mass of this population are taking cod-fish. They can do that on Sunday. But it is the practice and the custom of the herring fishers who go to the places where the herring come in in schools, to want their day in the week to go home to their families; and they do not want anybody competing with them when they do go home to their families. And they put this prohibition upon this particular industry to keep competitors from taking the herring while they wanted to stay at home. They were not resting fish, they were resting Newfoundlanders.



Let me observe here that this provision in the regulations of 1891 which was discovered during the course of Sir James Winter's argument, and suggested to him, which he, with all his intimate knowledge of the situation, did not know of, was there but one year. When the Commissioner came to make up regulations in 1891, he changed the old rule about nets on Sunday. The old rule was that they could not set the nets on Sunday and they could not haul them on Sunday, but there was nothing to prevent their being set on Saturday and left there to work, like money at interest, while one slept, to work all day Sunday catching fish, and let them be taken out on Monday. There was nothing in the law to prevent that until 1891, when those new regulations were made. And the Commissioner making the regulations put in that the nets should not be left in the water over Sunday. The next year it was taken out, and in these regulations now it does not appear. They have gone back to the old law.

The Sunday provision is a curious one in another way. That also, you will observe, is subject to the exceptions of this controlling act of 1884, which, notwithstanding any law to the contrary, gives the Newfoundlander the right to take his bait at any time and in any way. So that the Sunday provision applies only to bait, and does not apply to Newfoundlanders taking bait for the bank fishery, but only to the persons who, as Bret Harte says in one of his stories of life in a Western frontier village, are regarded by the inhabitants as having the defective moral quality of being foreigners.

1194 Then there is another interesting circumstance which you will find by looking at paragraph 78 of these same 1908 regulations, on page 209 of the American Case Appendix, at the end of the page. This enlarges the Sunday prohibition, so that it applies not merely to herring but to any bait fish:—

“No person shall between the hours of twelve o'clock on Saturday night and twelve o'clock on Sunday night, take or catch in any manner whatsoever any herring, caplin, squid, or any other bait fish, or set or put out any contrivance whatsoever for the purpose of taking or catching herring, caplin, squid, or other bait fish. Caplin may be taken for fertilising purposes by farmers or their employees during the usual season.”

That is to say, when caplin come in such quantities that human nature cannot stand it and the farmers can make good use of them, they can take them on Sunday. But when the herring come in in such quantities that American human nature cannot stand it, and they see the opportunity to make their whole voyage profitable and support for themselves and their families for the whole year to come, by availing themselves of the opportunity, on the Sunday, American human nature must conform itself to the Revised Statutes of Newfoundland. The Newfoundlanders are protecting themselves; they

are giving latitude to themselves to correspond to their own wants and their own wishes. The stern and severe rule of exclusion is to be applied to the foreigner, whoever he is.

That ends what I have to say about the Sunday provision.

[Whereupon, at 12.15 o'clock P.M., the Tribunal took a recess until 2.15 o'clock p. m.]

AFTERNOON SESSION, THURSDAY, AUGUST 4, 1910, 2.15 P.M.

THE PRESIDENT: Senator Root, will you kindly continue your address.

SENATOR ROOT, resuming: The next provision to which I refer is section 9 of the Consolidated Statutes of 1892 of Newfoundland. It appears on p. 176 of the United States Appendix. It will be found a little below the middle of that page (176):—

“No person shall, between the tenth day of May and the twentieth day of October in any year, haul, catch or take herrings or other bait for exportation within one mile measured by the shore or across the water of any settlement situate between Cape Chapeau Rouge and Point Enragee, near Cape Raye, under a penalty of two hundred dollars” and so on.

You will perceive that this time, between the 10th May and the 20th October, covers the period during which bank fishermen would wish to resort to the coast of Newfoundland to obtain bait, and this provision prohibits the taking of bait by anyone in any way within a mile of settlements.

There is a curious similarity in that to a treaty to which I expect to call your attention hereafter upon another point.

JUDGE GRAY: Will you point on the map where that is, Senator?

SENATOR ROOT: Cape Chapeau Rouge is over here, near the western entrance to Placentia Bay, and Point Enragee is up here quite near Cape Raye, so that this covers the entire southern treaty coast, and it also covers that part of the coast which is in proximity to the French Islands of St. Pierre and Miquelon.

THE PRESIDENT: May I ask you, Mr. Root, how long does the fishing season on the banks last?

SENATOR ROOT: I think it ends about November—October or November. The 1st November, I am told.

THE PRESIDENT: Thank you.

SENATOR ROOT: You see this covers the practical resort for bait. Our vessels leave the New England coast about the 1st March, they take their first baiting with them, or pick it up somewhere along the route, along Nova Scotia; but when they have used up that first bait, then they want to go to the nearest place where they can get it, and get it as quickly as possible, and get back.



I was about to refer to a curious similarity between this provision and the treaty of 1878 between Austria and Italy, which I was  
1195 intending to refer to upon another point. In that treaty in which Austria accorded rights of fishing to Italy upon the Dalmatian coast, the east coast of the Adriatic, there is a margin of 1 mile. Treaty rights are not allowed to come within 1 mile.

These gentlemen here have made a new treaty. They have put into their statute the same kind of limitation which Austria put into a treaty, protecting these people who dwell upon the coast for a mile from all their settlements, from the incursion of anyone to take bait, protecting their industry, protecting the sale of bait.

The next provision is a provision relating to purse seines.

JUDGE GRAY: When you say there is a discrimination, will you be good enough to point out just what it is in that 9th section. The President and myself both would like an explanation.

SENATOR ROOT:—

“No person shall, between the tenth day of May and the twentieth day of October in any year, haul, catch or take herrings or other bait for exportation within one mile measured by the shore or across the water of any settlement situate between Cape Chapeau Rouge and Point Enragee.”

That bars the Americans from the convenient and approximate treaty coast entirely, but it leaves the great body of Newfoundland open, where the Americans cannot go—open to the taking of bait for the purposes of sale.

SIR CHARLES FITZPATRICK: Is what you say now affected at all by section 28 which is found at the foot of p. 178?

SENATOR ROOT: That depends upon the meaning and force which they give to that clause.

As I have already said, it is quite clear from the other evidence in the case, when the original Act of 1862 was passed, I do not think they had any idea of its applying to Americans, but there did come a time when that view changed.

Lord Salisbury in his correspondence with Mr. Evarts regarding the Fortune Bay affair took the view that these statutes did apply to Americans, and while he abandoned the view that statutes passed after the treaty of 1871 applied under that treaty, he still maintained that statutes passed before the treaty did apply to rights under the treaty; and when they went a step farther, and Lord Granville wrote in his letter of 1880, he took the position that the statutes of Newfoundland generally applied, and I do not know whether when they passed this law they thought that this saving clause did apply to Americans, or did not apply.

SIR CHARLES FITZPATRICK: Would that not appear fairly obvious? If that section is to have any effect whatever, it must apply to the treaty rights of the Americans.

SENATOR ROOT: That it must?

SIR CHARLES FITZPATRICK: Yes, section 28; does it not say:—

“Nothing in this chapter shall affect the rights and privileges granted by treaty to the subjects of any state or power in amity with Her Majesty?”

SENATOR ROOT: Well, that clause is in all these statutes. That clause is in the statutes which the British are here claiming do apply to Americans. It is in the statute which Lord Granville asserted to apply to Americans. It is in the statutes which were the subject of negotiation to secure agreement or regulation as between Lord Granville and Mr. Blaine, following the year 1880. And, it is obvious that the question—whether that applies, or how far it applies—depends upon what you say the rights of the Americans are; and if you say, as Great Britain now says here, that the rights of Americans are subject to the right of municipal legislation by Newfoundland, then application by them to American fishing-vessels is no interference and has no effect upon the rights and privileges granted by treaty to the subjects of any state in amity, and so on.

SIR CHARLES FITZPATRICK: I did not quite understand it that way. I was under the impression that the position taken by those who represented Great Britain was that the Americans were subject to the municipal laws of the Province of Newfoundland in so far as these laws did not violate the treaty rights of the Americans. That is what I have understood their position to be as stated here.

SENATOR ROOT: But when they come to say what the treaty rights of the Americans are, they say, and the whole British argument here is based upon the proposition that there is an implied reservation of the right of municipal legislation. And, if there is such an implied reservation, then the exercise of the power of municipal regulation does not infringe upon American rights. It is all there, as to the construction you give to the treaty grant.

I am arguing the very proposition that your Honour has put. I am arguing that this treaty grant was a grant of a definite and certain right, with a line drawn round it by the terms of the treaty grant, so that this clause would except—must be deemed to except—American vessels from the application of such a statute. But, Great Britain says that there is no such line, that the treaty grant is subject to the right of municipal legislation, subject to the exercise of the sovereignty of Great Britain, that there is an implied reservation of the right of municipal legislation, because that is British territory. And, if that is so, then the line for which I am contending is wiped out, and these rights are subject to this legislation, and this clause does not save them.

Now I pass to the provision about purse seines. The use of purse seines is prohibited.



THE PRESIDENT: May I ask one question, Sir. A close season has the special purpose of protecting the spawning period?

SENATOR ROOT: That is natural.

THE PRESIDENT: And how long is the spawning season? Can you tell me how long it is?

SENATOR ROOT: I suppose but a few weeks. Certainly it does not last all winter.

THE PRESIDENT: Nor all summer. Probably not as long as from the 10th May to the 20th October?

SENATOR ROOT: Certainly not. Of course, different fish spawn at different times. My understanding is that the herring spawn in May. Mr. Lansing says they spawn in May, and that the spawning period lasts about a month.

Now, I will refer to purse seines. A purse seine is a kind of seine that is adapted to use by vessels, as distinguished from the seine adapted for use by men who can draw the seine on the shore. It is simply a seine with a cord running through rings at the bottom, so that when fishermen have to use it who have not any bottom to use it on, who cannot go ashore and draw their seines so that the fish will be kept in by being drawn along the bottom, they can make a bottom for themselves by pulling in the foot of the seine. That is a simple little device to enable vessels that cannot go to shore to utilize seines.

Upon this general subject of "seines," I would like to call your attention to the report of Mr. Joncas, read at the International Fisheries Exhibition in London in 1883. Mr. Joncas, I believe, was a Canadian.

SIR CHARLES FITZPATRICK: A Canadian, I understand.

SENATOR ROOT: At p. 606 of the United States Counter-Case Appendix he tells about the implements used. He says:—

"The nets used by our fishermen are generally thirty fathoms long by five or six wide."

"They are set in the evening, and in the morning early the fishermen visit them, take out the fish, and if necessary take the net ashore to clean it. Generally, in the spring, when the fishing is good, each net will take from five to ten barrels of fish during one night."

"But there is a much more expeditious mode of taking herrings than with nets, and that is with seines. Seines for this purpose must be of large dimensions, say from one hundred to one hundred and fifty fathoms long, by from eight to eleven fathoms wide, with braces of two hundred fathoms long. These seines are expensive and require many hands to work them, so that it is not every fisherman that can have one. There are also the purse seines which are used to fish the herrings on the banks, sometimes twenty and thirty miles from the shore."

Now, you will see that all this legislation, while directed at the seine, is protection of those on shore. The fishermen Sir James

Winter and other counsel told us about, who live in their little fishermen's huts, who have little capital, who have a hard life—and they must elicit the sympathy of everyone (they certainly have mine)—they have not the money to buy expensive seines, either the ordinary kind of seine, or purse seines, and they feel a natural antipathy to the people who come from a distance with these more efficacious implements for the taking of fish, and taking their bread and butter out of their mouths. The purse seine, Sir James Winter very frankly told us, is objectionable because it is more efficacious than other kinds of seines. It is also more expensive. It is more peculiarly the implement of the foreigner who comes. No one can complain of the shore fishermen having that feeling. Putting ourselves  
1197 in their places, how should we feel dependent for the support of our families upon taking fish as they come into the shallow waters of our bays and inlets, to see great fishing-vessels coming, whether from France, from New England, or from Canada, with the most modern and approved appliances, and taking the fish before they get in to us, instead of coming in to buy the fish from us.

I am not going into the question here as to whether there is any other reason against the use of a purse seine than that it is more efficacious. I am not going into the discussion of the question as to whether purse seines are injurious to fish, or any kind of seines injurious to fish. I am endeavouring to show to your Honours that this is another step, together with those I have already mentioned, in which the protection of the shore fishery against the vessel fishery is embodied in the policy of the Government of Newfoundland. The question whether a purse seine has any other objection than its efficacy still must be determined by experts, for whom we have asked, and whose appointment I understand our friends upon the other side have objected to.

Another statute which is not referring to herring fishery, or bait, but which breathes the same spirit, is the prohibition against the use of bultows on the south shore. That is to be found in its present form in section 62 of the Regulations of 1908, into which it comes from some period in the past, on p. 208:—

“No bultows shall be used on the fishing grounds from Cape La Hune to Cape Ray, both inclusive, in the district of Burgeo and La Poile.”

Cape La Hune was the limit of one of the other provisions, just east of the end of the treaty coast. Now Sir James Winter has told us that the only place on Newfoundland itself where cod-fish are taken in any considerable number is on the south coast. The way cod-fish may be taken is with the hand lines, by the shore fisherman, or with traps, which, as described by Sir James Winter, are those having four



sides, set down to the bottom, with a leader that runs up to the shore, so that as fish pass along the shore they run against this leader, that is, a net running up to the shore, they run against that, and follow that along down, and go into the trap, and there they are when the fisherman goes out in the morning. That is purely the shore fisherman's concern. He sets it out from the shore. It is not a vessel fisherman's plan. The way in which the vessel fishermen take cod-fish on this south shore, and also upon the Labrador shore, is by the bultow, these long lines; and, here is the provision which prohibits the use of that kind of fishing on the very coast and the only part of the coast to which Americans may resort for cod-fishing purposes. There are other little places, where there are local regulations, where there is a similar prohibition, depending, as Sir James said, on local option, people wanting to keep anybody else from coming and interfering with their fisheries.

You see they are protecting the shore fishermen against people coming from outside.

When you get up on to the Labrador coast there is another provision contained in the very next section on p. 208. That section provides:—

“No person shall place in the waters of the Labrador Coast, any cod-trap, or cod-trap leader or mooring, nor shall it be lawful for any person to put out any contrivance whatsoever for the purpose of securing a trap-berth on that portion of the coast:—From Blanc Sablon to Gull Island, near the north-east point of Square Island, before noon of the first day of June.”

Then in regard to another portion of the Labrador coast, before the 5th of June; another the 10th June; another before the 20th June, and so on down to the 10th July.

So that the times for setting these cod-traps and cod-trap leaders, which are used by the Newfoundland fishermen on the Labrador coast for the taking of cod-fish, are set at different dates from the 1st June to the 10th July.

That is supposed to prevent anybody from coming in and taking an unfair advantage, and getting a location for his cod-traps. You will notice it refers not only to placing the cod-traps, but of placing any contrivance for the purpose of securing a trap-berth.

There are other provisions which make it possible for a man to take and hold a cod-trap berth by putting up poles. That is regulated in section 54 of the same regulation which appears on p. 206:—

“Two poles or buoys moored to indicate the position in which it is intended a cod-trap is to be set,” and so on.

That is a regulation of Newfoundland fishing with reference to the securing of these locations for the taking of cod-fish and,  
1198 of course, by the 10th July, the great army of Newfoundland

cod-fishermen, who go to the Labrador, have got up there and they have got their cod-traps set and their cod-tray locations preempted. Then, on p. 209:—

“No bultows or trawls shall be used before the fifteenth day of August in any year on the fishing grounds within three miles of the Coast of Labrador or Islands on said Coast between a line to be drawn south-east from Cape Charles and a line drawn from east and West from White Islands in Domino Run.”

That is from a line somewhere down here (indicating on map) running up off this map. So that the best location for taking cod-fish is pre-empted for nearly two months by the Newfoundland fishermen with his cod-trap and contrivances before the American fisherman, who uses the bultow, is at liberty to go up on that coast and set out his bultow. When he gets there he finds the places where he would put his bultows for the purpose of taking cod-fish preempted by the cod-traps, again protecting the shore fisherman as against the vessel fisherman.

As I have said before, I am not blaming these people for wanting to protect themselves, but that is what they are doing and the effect of it all is to substitute a fishery dictated by the wants, the opinions, the local option of these dwellers in these little fishing communities along the coasts for the great fishing interests you have illustrated upon the shores of Holland and Scotland, to substitute the little humble fishers' daily tale of fish for a great fishery such as that which has built up the power and strength of Holland, and is one of the great sources of the wealth of Scotland, England, and Ireland to-day.

That is prohibited to us because these laws are the laws of shore fishermen, dictated by their wants and unrestrained by the large considerations which would apply to the whole of this fishery if it were the fishery of a single nation and a single government were to weigh in the balance the broader and the narrower interests.

Now, we come to still further expressions of purpose, a little different in origin, not originating with the fishermen, but originating with the Government of Newfoundland. This has reference to Sir Robert Bond's Question Six proposition. He has discovered that the Americans are not at liberty to go into any bays, or harbours, or inlets, or creeks on the coast of Newfoundland, and it is his purpose, he says, to keep them out. I read from p. 414 of the United States Counter-Case Appendix. He says:—

“I venture to go further than the learned counsel for the United States in his admission”——

He is referring to an admission made in the Halifax Case.

“and to express the opinion, after very careful consideration, that American fishermen not only have no right to land and seine her-rings, but they have no right to enter into the harbours, creeks, or



coves from Cape Ray to Rameau Islands, and from Cape Ray to Quirpon Islands, for the purpose of buying herrings or fishing for them. . . . If the position that I have taken up in regard to this section of the coast of this colony is correct, the exclusive rights to the winter herring fishery are under the British flag to-day, and always have been so ever since the dominion of the British flag was first established in North America."

I am not at this moment going to take up the argument of Question Six. I refer to the attitude of the Government of Newfoundland upon it as one of the group of circumstances illustrating the spirit and purpose of the Government of Newfoundland. It is set up here to be the judge of our rights, and it is to be the judge of our rights unless our construction of this treaty, which makes a definite line, be a correct construction.

Sir Robert Bond, says the counsel, has been turned out of office. Aye, but the Government of Newfoundland is here by counsel asserting, maintaining, the attitude of Sir Robert Bond. Says Sir James Winter:—

"But the fact that the question is now raised for the first time is because, up to the present time, they have never done cod-fishing, as it was expected and contemplated when the treaty was made, and they now come in to prosecute a business to which the Newfoundland Government, at any rate, very strongly object, namely, the fishing for herring in the bays on the west coast."

I am reading from p. 3582 of the typewritten Argument [p. 597, *supra*]. Sir James proceeds:—

"When they set up this claim for the first time it becomes necessary to enquire strictly into their legal rights. Then, for the first time, we examine into their title deeds to see what their title is to exercise this new fishery, to carry on a new business which it is the object and purpose of the Newfoundland Government, for the present at any rate, to prohibit altogether."

1199 Nor is it a new purpose, a new policy with Sir Robert Bond.

That very excellent gentleman's name has come into prominence in the discussion because it happened to be he who made this great discovery, which discovery was but one of the incidents of the execution of that policy. In his speech of the 12th April, 1905, reading from p. 443 of the United States Counter-Case Appendix, I find Sir Robert Bond saying:—

"My memory as a member of this Legislature goes back now for nearly a quarter of a century, and I do not remember that the position was ever before taken in this house that our fishermen could not compete with either the American or French fishermen on an equal footing. The object of every bill that has been introduced into this Legislature in relation to foreign fishermen has been with the sole view to bring about an alteration in the foreign bounty system or the reduction of prohibitive duties."

I am not finding fault with Sir Robert Bond or with Newfoundland for attempting to bring about a change in the bounty system or in the protective duties of another country. I am urging upon you that this is not the attitude of a judge, that that purpose which has inspired the consistent policy of the Government of Newfoundland for a quarter of a century, as Sir Robert Bond says, is wholly inconsistent with what my honourable friends on the other side call the fair regulation of our rights. I am saying that if there is no line of demarcation set by this treaty grant upon our rights, but they are left to the unrestrained judgment, the discretion, the legislative authority of the Government of Newfoundland, our rights are gone; and all this right, for which John Adams was willing to refuse peace, for which John Quincy Adams threatened war to Bagot in 1816, was an idle fantasy, a delusion, unprotected by the terms of the instrument they were so insistent upon.

Still further, what is the meaning of these laws about the employment of Newfoundland fishermen, about the shipment of Newfoundland fishermen, or of any fishermen within the jurisdiction? What is the meaning of the provisions of the Act of 1905 and 1906? They do not relate to the purchase of bait. Here the two lines come together. They relate to the taking of fish. Let us, for the present, assume that they were justified—under some construction of the treaty they would be justified—let us assume that Newfoundland had a perfect right to prohibit the shipment of any sailor, of any fisherman in a fishing crew within the territory of Newfoundland, let us assume that they had a right to prohibit any British subject from fishing from an American vessel within the territory of Newfoundland, let us assume that they had a right to prohibit any Newfoundlander to go outside of Newfoundland territory for the purpose of shipping upon an American vessel—why did they do it? They did it for no other purpose, or conceivable purpose, than to limit, restrict, interfere with and prevent the successful prosecution of the American fishery. It was the spirit of competition, it was the determination to destroy a competitor's enterprise that dictated these laws. Granted, if you please, that they had a perfectly legal right to make those provisions, they exhibited the spirit which I am discussing, and it was exhibited in their regulation of our fishery as well as in the particular statute to which I refer.

We are not without much evidence as to this spirit and purpose. It was intense, it was controlling, it made the Government of Newfoundland willing to ignore the interests and wishes of their own fishermen. It was not a fisherman's policy, but it was a trading policy which was outcropping for the benefit of the great fishing and trading firms of St. John's, and it was the same policy which led Great Britain into the statutes which you have read, that endeavoured



to keep Newfoundland unpopulated and inflicted penalties upon people endeavouring to live in Newfoundland and fish—a roast when they wanted raw and a raw when they wanted roast policy. Here is the way in which the fishermen looked at it, United States Counter-Case Appendix, p. 380. The fishermen of the Ferryland district—observe, not on the treaty coast—send a petition to the Legislature in which they say:—

“That your petitioners are engaged in the cod-fishery on the southern shore, and until two years ago added to their earnings from that avocation by the sale of bait to American vessels.

“That this bait business was one which enabled your petitioners to earn considerable money, and that the visits of these American vessels resulted in the circulation of considerably larger amounts to the sale of ice, stores, fishing outfits, shipping men, and proving a means of circulating at least \$40,000 per year to the people of this district.”

They strenuously object to this new policy of the Government of Newfoundland in so far as that branch of it goes which is concerned with preventing the sale of bait. They say:—

“That this traffic has become so profitable to the people of these Nova Scotia ports that they are advocating the abolishing of the license fees altogether, and allowing free entry to the American fishermen, without any restrictions, for the sake of the trade they bring. . . .

1200 “And that your petitioners, therefore, humbly pray that this Legislature in its wisdom will terminate the present policy of hostility towards the American fishermen, and return to that under which the people of this district and other districts of the Colony were able to earn food for their families by carrying on legitimate traffic with the Americans, instead of being, as they are now, obliged to emigrate to foreign lands to obtain a livelihood denied them at home.”

The Bay of Islands fishermen held a monster mass meeting, in which they passed a resolution protesting against the new policy. They say, at p. 386 of the United States Counter-Case Appendix:—

“We beg to state most emphatically that the people of this coast are unanimous in condemning this policy as one which is injurious to the best interests of the Colony as a whole, and ruinous to the livelihood of the people of this Western Coast.”

Governor MacGregor, forwarding that in a letter of the 4th of April, 1907, to the Colonial Office, says that the newspaper which reports it represents that this resolution was adopted at a meeting which was well attended and that “the resolution was adopted with practical unanimity, and expresses the deliberate opinion of the community.” There was a protest from Bonne Bay, which appears at p. 389. The fishermen, in what they say, point to the real origin of this policy:—

"If ever the Americans are effectually excluded, it may be that the West Coast merchants who engage in the Bank fishery will come to the front; but before killing the goose that laid the golden egg the substitute or successor should have been found."

Governor MacGregor writes, p. 390:—

"At the same time it is impossible to conceal from oneself the fact that the people of Bonne Bay and of Bay of Islands are those that are most directly interested in, and dependent on, this particular herring fishery, in which practically no others, except the people of St. George's Bay, participate."

There were a number of others that I will not detain you upon. Mr. Elder has read to you what Sir James Winter said in a formal public interview regarding this policy as being a policy directed against the interests and against the protests of the fishermen themselves. Now, here is the explanation of it—United States Counter-Case Appendix, p. 446. Sir Robert Bond reads, in his speech to the Newfoundland Legislature, a communication which he has received, dated the 23rd March, 1905, signed by a list of merchants of St. John, and containing this resolution:—

"*Resolved*, That, in the opinion of the meeting,"—

It seems they had had a meeting.

"it is expedient and highly important that immediate steps should be taken to prohibit American fishermen from obtaining supplies of bait fishes in the harbors or upon the coast of Newfoundland, and that a copy of these resolutions, bearing signatures, be forwarded forthwith to the Right Honourable Sir Robert Bond."

On the preceding page—445—he quotes the Hon. Edgar Bowring, of the firm of Bowring Brothers, Limited, as follows:—

"The Hon. Edgar Bowring, of the firm of Messrs. Bowring Brothers, limited, than whom there is no firm in the colony more largely interested in the fisheries, addressed me a letter in reply, in which the following occurs:—

"'I have to say that I think it is of paramount importance that the government should take immediate steps to prevent the Americans from obtaining bait supplies.'"

There are many other places in the record which show that this is a trade policy pursued as against the fishermen's interests, and I beg you to bear in mind that that policy is a policy that cannot be carried out except by both preventing the purchase and preventing the taking of bait fish. Of course, the fishermen do not want us to take fish, but they want to sell them. Of course the great trading firms of Newfoundland do not want our competition with their source of supply. Until the American fishing-vessels came to buy from those poor fellows on the shore, the trading firms of Newfoundland had the fishermen in their hands; they could dictate the price, they could give as many gallons of molasses, or as many rub-



ber boots or oilers to the fisherman for every quintal of fish he brought in as they pleased; but now, with the American competition, the fisherman gets his opportunity of making his price. If he can get a better price from the Americans he sells to them instead of selling to the Newfoundland firms; and we find in Captain 1201 Anstruther's report a communication stating that some sell to the Newfoundland traders and some to the Americans, not to accommodate the Americans, but because they get a better price. It is for the interest of the trader to prevent competition, it is for the interest of the fishermen to have competition; but the Government of Newfoundland, answering to the impulse of the trader, shows its purpose not of fairly regulating the fisheries, but of preventing the Americans from having bait for the bank fishery in order to compel a commercial concession, and also shows that for that purpose it is willing to ride down and over the interests of the fisher-folk for whom our sympathies are invoked here.

Not only that, but they are willing to float the power of England. In a score of communications which have been read to you here and in which Sir William MacGregor addressed the Colonial Office, he advisedly used the expression: "My responsible advisers" think so and so, that wise and capable man excluding himself from participation. In the score of communications that appear in this record the colony of Newfoundland treats the Government of Great Britain with scant courtesy, with persistent condemnation and in a contumacious spirit. They are willing to violate the traditional policy of the British Empire, so designated here, which never permitted the withdrawal from France of the ordinary trading privileges as to the purchase of bait. They are willing to do that for this sole purpose, that involves necessarily the prevention of our fishing rights under the treaty of 1818 as well as the prevention of our purchase under the ordinary comity of nations.

And Sir James Winter does not hesitate to say, after his review of the whole situation, that the American treaty right is worthless. After discussing this Question No. 6 the President says that it was worthless as regards herring, and Sir James Winter says: Yes, it is to a certain extent worthless as regards herring, and practically also worthless as regards cod-fish on that part of the coast.

Sir Robert Bond of course boldly avows the same position in 1905 in the extract relating to Newfoundland being the mistress of the northern seas. She is mistress, his proposition is; and if the British theory of this grant is right, so she is. If we are prevented from buying and we are prevented from taking, we hold this great industry upon the banks at their will and in their power, and I suppose we must abandon it, or we must pay over again for the opportunity of getting bait to prosecute the industry.

I am not going to discuss protective tariffs. We have a tariff policy under our system of government. The national Government is practically assigned to indirect revenues, the field of direct revenues is practically occupied by the separate States for local purposes, and in the raising of revenues by indirect means we have built up a tariff, and we have applied to it a principle which largely obtains now throughout the world, that we shall raise our revenue by putting our duties upon such things as involve competition with our industries at home.

I do not think we are open to the charge of being very selfish, because we have opened our shores and all the wealth of our country to the millions of all the nations of Europe. We have given to them freely, without thought of their competition, of all the benefits that the richness of our land and the security of our Government could afford; but we have said that in raising our necessary revenue we will impose the tax so that it shall contribute to the food, the clothing, the prosperity of those who come to us. And I submit that there ought not to be a construction put upon this treaty which will deprive us of the benefit of it unless we are willing to buy the benefit over again, by changing the general fiscal policy of our Government for the benefit of the Government of Newfoundland.

I pass to another proposition, passing off the narrow field of the particular situation in which we are involved in Newfoundland through the execution of this purpose that could be executed only by destroying our treaty right, to a more general consideration. It is that this situation is the situation that must always be anticipated in the case of grants of this character—I mean of this generic character; grants which constitute a perpetual burden granted to one country upon the territory of another.

A question has been raised as to why such grants need exemption from the power of municipal regulation and limitation by municipal legislation, while trading rights do not. It is because of the ingrained, innate distinction between the two. Trading rights are temporary. The vast number of trading treaties all, so far as I know, are temporary. When circumstances change they expire. They are made for such periods that no change is to be anticipated. One can make an agreement for 10 years, 5 years, or perhaps for 15 or 20 years, forecasting what the course of development may be, and with reasonable certainty that no change of conditions will make a stipulation that is advantageous to one's country to-day disadvantageous before the period ends. They are reciprocal and mutually beneficial. An undue restriction upon one side immediately meets with some restriction upon the other side; and the advantage that is obtained by one country cannot be restricted, limited, modified, changed, taken away, in whole or in part, without a similar



treatment derogating from or taking away the advantage to the other country. All the conditions of the trading right urge the people of each country towards its preservation and continuance in its full force, because upon the preservation of the other country's benefits depends the preservation of their own benefits. But a right like this, perpetual as against all the changing conditions of the changing years, always a burden, is sure to become vexatious, the cause of irritation and of resentment, with no interest on the part of the people of the country on which the burden rests for its preservation, for nothing more comes to them. The trading right in its nature urges to preservation. The perpetual burden in its nature urges to destruction. And the course of conduct on the part of the Government of Newfoundland which I have been detailing, without criticism or condemnation, is but the subjection of our right to the inevitable working of human nature which must apply to every such right as this, and which must demand for the efficacy of the grant of the right an exemption from the opportunity for municipal legislation to control, limit, restrict, or modify the right.

THE PRESIDENT: If I understand you well, Mr. Senator Root, you base the claim that this right is quite of an exceptional character, that it is different from the regular treaty rights, on its perpetuity?

SENATOR ROOT: It is different from the regular treaty rights of trading, for instance, the kind of rights that I am speaking about, in two respects: one that it is perpetual and therefore must meet the changing conditions of the country to which it applies, and the other that it is a one-sided burden.

JUDGE GRAY: That it is unilateral.

SENATOR ROOT: That it is unilateral and has to sustain it, no continuing benefit whatever coming to the country upon which it is a burden.

THE PRESIDENT: How would it have been with the rights of the American fishermen in British territorial waters according to the treaties of 1854 and 1871? Were these rights the same or were they different?

SENATOR ROOT: They were different in respect of the necessity in regard to which I am speaking now. In the making of temporary and reciprocal fishing arrangements there is not the imperative necessity for exemption from regulation that there is regarding a right of this kind, and that is one of the reasons why many competent writers of authority do not apply the doctrine of servitudes to temporary treaties.

THE PRESIDENT: So your conclusion would be that the American fishermen, under the treaties of 1854 and 1871, were not exempted?

SENATOR ROOT: No; I beg pardon. I do not think that. I think they stood upon the same ground. I think they were exempted from

the power of legislation, but the urgent necessity for exemption which applies here did not apply to those treaties. I shall take up the nature of the right hereafter, and of course the right might have existed, although it might not have been necessary for it to exist. If one were arguing the question whether the exemption existed under those treaties, one would not have the ground of argument which I have just been urging regarding the treaty of 1818, that is all.

THE PRESIDENT: There would be another basis?

SENATOR ROOT: There would be another basis which applies both to the treaty of 1818 and to those, but this basis of argument would be wanting.

THE PRESIDENT: Yes.

SENATOR ROOT: It might well be that one could find the exemption here and not find it there, although I think that it exists in both cases.

THE PRESIDENT: In the American Argument it is in some place expressed that the treaty of 1871, in its grant of fishing rights, is in effect the same as the treaty of 1818.

SENATOR ROOT: Yes. I suppose that is designed to refer to the terms of the grant.

1203 THE PRESIDENT: Yes. It refers to the terms of the grant.

But, therefore, one might conclude that, also under the treaty of 1854 and 1871, American fishermen were exempted from the British regulations.

SENATOR ROOT: I think they were; but not on this ground.

THE PRESIDENT: Not on this ground, because these treaties were not perpetual?

SENATOR ROOT: Precisely.

THE PRESIDENT: And were not unilateral?

SENATOR ROOT: Precisely.

I have said something about sympathy with the Newfoundland fishermen. Of course one cannot help it. This is a burden. But there is a right way and there is a wrong way to get rid of a burden. The right way is to do as Great Britain did with France—make a new agreement with her, and to the extent that the burden is relieved by cutting down the right that was burdensome, to make compensation for it, as she did in 1904. The wrong way is to do what is being done here, to whittle away, wear away, fritter away the right so that it is worthless, and it will no longer be profitable to maintain it as a burden.

Let me call attention to the fact that when fishermen are let alone, they settle the difficulty. They have settled it whenever they were left to themselves. It is no necessary burden upon Newfoundland, because when the fishermen were left alone they settled it by—what? By substituting for the treaty burden a profitable trade for them—



selves. And everything went merrily as a marriage bell until the Government of Newfoundland undertook to close down, with its purpose to use the trading right in order to affect our fiscal policy. And when we came to the *modus vivendi* of 1906, Great Britain and the United States agreed upon it, and on the suggestion coming from fishermen, we put into the *modus*, or letter, or instrument containing it, a clause that other arrangements might be made on the coast—I do not remember the exact words; but there was that permission, that the local people might adjust matters; and they did; they substituted a *modus* of their own for ours, and it went on. If they can only be let alone, they will adjust the matter. Great Britain did the same thing to France; in addition to giving her territory in other parts of the world; she gave the right to purchase bait, the ordinary trading right, adapted to the uses of fishermen.

So there is no very serious burden, and no real cause for special sympathy, except that the fishermen have a Government that cares more about the interests of the St. John's traders than it does about the interests of the fishermen.

Where does all this leave us? The British theory of their right is, as I have said over and over again, that the treaty grant is subject to the implied reservation of the British right to legislate. That is stated without any reserve. The obligation of reasonableness is not an obligation of sovereignty. If their theory is correct, if the treaty grant is subject to the right of legislation, it is subject to a right that is under no obligation of reasonableness towards us. That is of the essence of sovereignty—itsself to determine what is the policy to be enacted into law. The policy of the empire is to find its expression in the legislation of the empire, and all its legislative bodies. I need not trouble the Tribunal with citations from the argument. Sir Robert Finlay stated it at the outset:—

“Subjection to British legislative control was inherent in and formed an essential part of the very subject-matter of the treaty.”

He said [p. 213]:—

“The right to make such regulations springs out of the sovereignty which the British government retained over the coast and the territorial waters.”

It is not because of anything that is found in the treaty that that statement is made. It is because Great Britain is sovereign, and the right to which our treaty grant is subject is the right of sovereignty. Nothing that counsel can say here can impose a limit upon that right of sovereignty. We know well what it is.

I am laying aside now, for the moment, what is said in the statement of the question about reasonableness. I am merely pursuing the British argument, the theory upon which the argument is based, for the purpose of testing the soundness of the proposition that the

grant is subject to British sovereignty. If there is an implied reservation of the powers of sovereignty, and our grant is subject  
1204 to it, Americans must be subject to the same restrictions by law as British subjects are; and that is what Great Britain says. The power of Great Britain over our treaty must be commensurate with her power of legislative control. If the treaty grant is subject to the sovereign power, the sovereign power cannot be subject to the treaty grant. One must be controlling, or the other. The proposition of Great Britain is that her sovereignty is controlling, and, therefore, not the treaty grant.

Every government, of course, considers itself under a certain obligation to be reasonable, to be fair, to be just; but it is an imperfect obligation. It is to be reasonable, to be fair, to be just, according to its own conception of what is reasonable and fair and just. It is a law unto itself. That is sovereignty. And the subjection of the government to the law of reasonableness is a subjection to its own will, controlled by its own idea; and if the grievous situation of the traders of Newfoundland makes it reasonable that limitations should be imposed, or impairment visited upon any fishing privilege or right upon the coast, that is competent to government. The standard to be applied to us is the standard to be applied to British subjects, we are told; we are subject to regulation because they are subject to regulation; because our right is subject to the sovereign right which regulates them; and if our right is subject to the sovereign right of legislation, then there is nothing unreasonable in imposing such limitations upon our right as, in the exercise of their sovereign judgment, they see fit to impose. It is not unreasonable for them so to limit and restrict our right as to subserve the whole interests of the Colony of Newfoundland or the British Empire. If our right is subject to their sovereignty, it is no impairment of our right for them to say: "No herring shall be taken upon the west coast for six months, for six years, for sixty years," or "no codfish shall be taken upon the south coast." They can do what they did do in the treaty of 1857 with France, which did not take effect, because the Newfoundland legislature never passed the necessary legislation to make it applicable; a treaty concluded and ratified, and effective as between Great Britain and France, but never becoming applicable for lack of legislation. There they did give France, in express terms, the exclusive right to fish upon the north coast, from Quirpon Island to Cape Norman, and at five separate points down on the west coast, all on the treaty coast—Port au Port and a variety of other places that I do not recall at this moment. If the American treaty grant was subject to the legislative power of Great Britain, there would be nothing unreasonable in their exercising their right to impose that same limitation upon us which they imposed then in favour of France. There is



nothing unreasonable in a country's asserting its rights. There is but one way in which the grant of 1818 can be protected against the sovereign power of Great Britain, with all the scope of that sovereign power, and that is by drawing the line of the grant as against the sovereign power; and the moment that you assert that the grant is subject to the sovereign power, it is completely under the control of the sovereign power. No obligation of reasonableness, which is to be in the judgment of the sovereign, is any protection to any extent whatever.

THE PRESIDENT: Do I understand you, Mr. Senator Root, that you now base the claim of the American right being not subject to British regulations, not as you did before on the unilateral or the perpetual character of this treaty, but that you base this claim now upon a more general ground—upon general ideas of international law, and general ideas concerning the binding effect of treaties?

SENATOR ROOT: No; if you will permit me to explain——

THE PRESIDENT: That is the object of my question. I want to understand you exactly.

SENATOR ROOT: I am now addressing my remarks to the character of the right as claimed by Great Britain. I am not now arguing on the character of our right. I shall address myself to that presently. I am endeavouring to describe and exhibit the true character of the British claim, and the effect which that claim will have upon the treaty right, if you accord it the approval of your Award.

THE PRESIDENT: That was a description of the consequences the British contestation would have?

SENATOR ROOT: Precisely, yes; and I shall presently take up the other view, and present what seems to be our right—the nature of the right granted and the legal effects of that nature.

My present proposition is that the British right, as stated and argued by them, involving and based upon the assertion in the fullest possible form that the treaty grant is subject to British sovereignty, is necessarily in its effect destructive; that is to say, it is at their will to make it destructive.

1205 Take a practical situation: What is the United States to do? A law is passed which American fishermen think seriously interferes with the profitable prosecution of their industry. The law, in the ordinary course of events, will become effective before the fishermen ever hear of it. They know of it only when some local officer tells them they cannot do thus and so. What are we to do? Appeal to the Government of Newfoundland? Well, the Government of Newfoundland is possessed of this spirit and purpose which I have been describing to the Tribunal. We get nothing. Appeal to the Government of Great Britain? No one can have a higher respect or a warmer regard for any body politic

than I have for the Government of Great Britain; and no one, certainly, could ever have experienced more courtesy or kinder treatment than I have always experienced from the representatives of that great Power. Nevertheless, one cannot blind himself to the fact that a change has taken place in the relations between the Government of Great Britain and her colonies in recent years. The change began with this American revolution, which was ended by the treaty of peace in 1783. The Attorney-General, I think it was, referred to it as the civil war, and I rather like that way of describing it; for it was a civil war among the people of Great Britain. It was that which first taught Great Britain how to treat colonies. She has profited by the lesson, and our friends in Canada and Newfoundland and Australia and all over the world have been benefiting by it. And from that time to this the colonies of Great Britain have gradually grown more and more self-governing, and nearer and nearer to an independent attitude. The ties between them and Great Britain have come to be largely voluntary—ties of voluntary adherence, of sentiment, of loyalty. And it has become more and more evident that they would not survive deep and long-continued resentment.

Sir Robert Finlay rather protested against reference to the colonies as being different from Great Britain, and said they are one. They are one, in a juristic sense. They are one as they appear in this proceeding and before this Tribunal. Nevertheless, for the purpose of dealing with a practical situation it must be realised that they are far from one; that Great Britain has handed over general legislative power to this other body, this self-governing colony of Newfoundland, which proceeds in accordance with its will, and if officers of the Government of Great Britain undertake to interfere, talks about violation of the constitution of Newfoundland, and talks pretty sharply and stiffly, too.

Great Britain has vested in the Government of this self-governing country the power to exercise the discretion of sovereignty; that is to say, the power to exercise this very discretion subject to which the British Argument places our treaty grant. It is not quite, but almost, equivalent to a change of sovereignty. And when we appeal to Great Britain against a decision by Newfoundland in a certain law establishing a close season, prohibiting us from fishing thus and so, or now and then, what do we find? We are appealing to Great Britain against the exercise by this self-governing colony of the very power that Great Britain has vested her with. What is Great Britain to do? Take away her constitutional power, or declare that the exercise of it has been a violation of the treaty? Ah! But on the British theory it is not a violation of the treaty, because the treaty is subject to the exercise of that very power.



Suppose Great Britain were of the opinion that comity, kindly feeling, good relations with the United States called upon her to review the action of the self-governing colony of Newfoundland as to whether this power with which the colony had been invested had not been abused. Ah! There we have it. We have to prove, and to secure any action from Great Britain we must prove, that there has been an abuse of the power, and that is very difficult. It must be a case gross, extreme, outrageous, to lead the mother country to face the inevitable resentment of her colony which would follow a condemnation for an abuse of its constitutional powers. Hardly a practical relief.

THE PRESIDENT: But was it not practised in 1906—withholding the Royal sanction to the Act of 1906?

SENATOR ROOT: Yes, it was; for the purposes of this arbitration, and when Newfoundland imposed conditions upon her consent to entry into the arbitration; that is, the conditions of including in the arbitration Sir Robert Bond's Question Six and also the trading question. But you will remember with what indignation that was received by Newfoundland.

THE PRESIDENT: Yes.

SENATOR ROOT: And it was justified by Great Britain in 1906 this correspondence, not as a reversal, not as a final judgment, but as a necessary *modus*, to make it possible to secure an adjustment by arbitration between the two countries.

Now, as to arbitration; the practical bearing of that. Of course I am talking now only about the practical situation that we would be in, and therefore I refrain from any reference at this time to the fact that you are first to pass upon rights as they existed under the treaty of 1818, which would be the basis of further arbitration. But there is one preliminary thing to be considered, and that is: What is the scope and continuance of article 4 of the agreement? First, as to its scope, if any question arises regarding the exercise of the liberties referred to in the treaty of 1818 (this is on p. 6 of the United States Case Appendix) it may be determined in accordance with the principles laid down in the award. The Tribunal is to "recommend, for the consideration of the contracting parties, rules and a method of procedure under which all questions which may arise in the future regarding the exercise of the liberties by them referred to may be determined in accordance with the principles laid down in the award." If the rules are not adopted—

"then any differences which may arise in the future between the High Contracting Parties relating to the interpretation of the Treaty of 1818 or to the effect and application of the award of the Tribunal shall be referred informally to the Permanent Court at The Hague for decision."

And so on. Now, I say, as to the scope. The Permanent Court at the Hague, if we get there ever, and I hope it will never be necessary to go under this article, will have to make their decision upon the interpretation of the treaty of 1818 and the effect and application of the award of this Tribunal. Suppose this Tribunal makes an award which affirms the contention of Great Britain here, that is to say, that the treaty grant is subject to the sovereign power of municipal legislation. What is the new Tribunal going to say when that power has been exercised? That is the award. That is the law for the parties. It has been the exercise of a sovereign power that we are subject to. Suppose you add that it must be reasonable, and that is for the Tribunal to determine. Then we have got to prove that there has been an abuse of the discretion. We have got to make a proof of the negative. Instead of the United States going upon the treaty coast to exercise a liberty granted in 1818 as it had been exercised time out of mind, as it was exercised without interference for half a century after the treaty of 1818, and meeting an assertion that now the exercise of that liberty ought to be restricted, an assertion that there is good reason for restricting it in time or in manner, and the establishment of that to somebody's satisfaction, the United States must go to this Tribunal and prove that there was not any reason for restricting—a very difficult thing to do; in a majority of cases quite impossible to prove that there is no occasion. It is a complete reversal of the rights. Our rights are to be our rights as granted; and if there were anywhere a right to change them, the burden of justifying, giving grounds, reasons for the change, should be upon the person who proposes to change them. If the British theory is maintained by your award, there is a complete reversal, and we have got to make the negative proof. Our right as it was originally granted and originally exercised, is to be assumed to be all wrong, and a different situation and a different method is to be assumed to be right, and we are to disprove it. I do not know whether anybody can prove that a limitation against the use of purse seines ought to be imposed or not, and I do not know whether anybody can prove that the limitation against the use of purse seines is unreasonable or not; but I do know that there is an immense difference between having somebody else prove it to be necessary and having yourself to prove that it is unnecessary; and in the majority of cases that difference of the burden of proof would probably be controlling.

THE PRESIDENT: I beg pardon for so often interrupting you, Senator Root, but I really think it is necessary. These are now the last days that we have the benefit of the assistance of counsel, and therefore we must make use of the opportunity—perhaps it might seem that we are abusing it; I hope not.



The contention of the United States is that they have a *liberum veto* of objecting to particular regulations. The contention of the United States is that if you consider one of the British regulations as contrary to the treaty, you may object to it, and then the matter is at an end; Great Britain has no longer the power of enacting those regulations. And the British contention now, as it stands, is that Great Britain has a right to make the regulations. You have the right to make diplomatic remonstrances, but if Great Britain will not listen to these remonstrances the matter is again at an end. Great Britain says: "We do not want your objections. We do not consider you objections."

According to the fourth article, the solution would be that either this Court would propose some method of procedure to which  
1207 both governments would accede, by their free-will—they are not obliged, at all, to accede to them; it is a pure recommendation—or if they do not accede, then both parties have bound themselves by article 4 to submit future contestations to the decision of The Hague Tribunal in the summary procedure.

Would it not seem that both parties would gain by this method?

SENATOR ROOT: Precisely; both parties would gain by this method. But I beg the Tribunal to observe that it works both ways: If the United States refuses its assent to proposed limitations, that can go to the Tribunal just as much as if Great Britain on the other theory imposed regulations to which the United States objected.

THE PRESIDENT: I should think there would be no victorious party and no vanquished party, in that case.

SENATOR ROOT: If the line is drawn according to the American contention, there is an assertion on one side that there ought to be this regulation for the common benefit; there is a refusal to assent to that on the other, and they go and get a determination. But, under the British theory, that our grant is subject to their right of municipal legislation, the exercise of their right in the first instance establishes the regulation.

SIR CHARLES FITZPATRICK: Do I understand you to say that if a regulation is made, and if you object to it, then it would be the right of the British Government to hale you before The Hague Tribunal, under Section 4?

SENATOR ROOT: Undoubtedly.

SIR CHARLES FITZPATRICK: Then it is the exercise of sovereignty that made it?

SENATOR ROOT: I do not quite get your question.

SIR CHARLES FITZPATRICK: Then do you not necessarily admit the right of the British Government to make the regulation?

SENATOR ROOT: No.

SIR CHARLES FITZPATRICK: Subject to your objection?

SENATOR ROOT: No. Because my proposition is the regulation shall not take effect until it has been determined that it ought to take effect.

SIR CHARLES FITZPATRICK: That is right.

SENATOR ROOT: My proposition is that the application of the British theory here is that by force of British sovereignty they can make a regulation which is imposed, which does take effect, upon which they have decided—they, and they alone, have decided—in the exercise of their sovereign power, and have made it effective; and that it shall stand there until we have appealed to an arbitral Tribunal for the purpose of reversing their decision.

SIR CHARLES FITZPATRICK: Do I understand you to say, then, that if you object, and the principle is adopted that in case of your objection the regulation would not have effect until such time as it would be submitted to The Hague Tribunal, that you would be satisfied with that?

SENATOR ROOT: Precisely. Certainly. That is what we are contending for. And I think that this treaty grant draws clearly the line within which that principle applies; that Great Britain has full and unrestrained scope of sovereignty until she comes to that clear and definite line, that is, of the exercise of the right of fishing, as granted in the terms of the grant; but when she comes to that narrow field, wishing to change the situation by making a new limitation, that was not in the treaty, a limitation upon the times or manner, then that ought to be in practical good sense the subject of consultation between both owners of the common right; and if they cannot agree, let it be determined before it is made effective and our fishermen's vessels are seized under it. My objection to the British theory is that they propose to make these things effective by virtue of their sovereignty, *ex proprio vigore*, before anybody has decided. Sir Robert Finlay says they have not the right to decide; that they do not claim the right to decide; that they ought not to decide—but they propose to make effective these limitations by deciding.

1208 THE PRESIDENT: Your rights, as you consider them, would be safeguarded by conceding to you a suspensive veto?

SENATOR ROOT: Precisely.

THE PRESIDENT: A suspensive veto, until the decision of an impartial Tribunal?

SENATOR ROOT: Precisely. Before this treaty was made, what we claimed was that instead of going ahead and putting your regulations, extending your sovereignty, over the modification of this right without saying anything to us, you should consult us first, just as you did with Mr. Marcy, when these laws were brought down to him and he approved them. And in order to obviate the claim that that



might lead to a deadlock, and might put Great Britain in a most disagreeable situation, because she has got this colony behind her, pressing always for extreme views and extreme action, we make this agreement, under which, if we cannot agree upon what ought to be put into force, we will go to The Hague Tribunal, and we will have an arrangement, perhaps a more convenient and practical arrangement, proposed by the Tribunal, for determining whether they ought to be put into effect or not.

SIR CHARLES FITZPATRICK: Or the parties can arrange it themselves?

SENATOR ROOT: Certainly; and they will arrange it. There is no trouble about making the arrangement. The great trouble is, and the best thing that can be done for Great Britain—I know my friends on the other side will smile at me when I say it, but I say it not proposing to arrogate to myself the position of a guardian for Great Britain—the best thing that can be done for Great Britain is to give a line of right here so that she will not be in the position of having either to assent to unjust and extreme positions taken by her colony, in the spirit that has been exhibited here, against her own feeling of what is really due to us on the one hand, or to over-rule them and have her colony feel that she has been unkind towards the colony, and has been deciding against it of her own will.

The only way in which to bring about a practical solution of these difficulties is to fix this line of right, and give to Great Britain the protection of an obligation imposed by the award to have a just judgment upon the proposed regulations before they are put into effect.

[Thereupon, at 4.15 o'clock P. M., the Tribunal adjourned until to-morrow, Friday, the 5th August, 1910, at 10 o'clock A. M.]

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THIRTY-SIXTH DAY: FRIDAY, AUGUST 5, 1910.

The Tribunal met at 10 o'clock A. M.

THE PRESIDENT: Will you please continue your argument, Mr. Senator Root.

SENATOR ROOT: Before the adjournment I had referred to the question of the continuance of the arbitration provision in article 4. I refer to it rather for the purpose of precluding the question than of arguing the question. The Tribunal has already observed, of course, that this Special Agreement under which we are now proceeding is in terms a—

“Special Agreement for the submission of questions relating to fisheries on the North Atlantic Coast under the general treaty of

Arbitration concluded between the United States and Great Britain on the 4th day of April, 1908."

That general treaty of arbitration appears at p. 11 of the United States Case Appendix, and that is a treaty, which the Tribunal will perceive by article 4, is concluded for a period of five years. I have no reason to doubt that it will be renewed at the expiration of the five years; but, nevertheless, it is a treaty which terminates by its own terms in three years from this time; and there might be a question whether the provisions of article 4 of this Special Agreement, which is an agreement made under the treaty, would survive the treaty under which it is made.

1209 In article 2 of the treaty itself, on p. 11, there is a provision for the Special Agreement. The treaty says:—

"In each individual case the High Contracting Parties, before appealing to the Permanent Court of Arbitration, shall conclude a special Agreement defining clearly the matter in dispute, the scope of the powers of the Arbitrators, and the periods to be fixed for the formation of the Arbitral Tribunal and the several stages of the procedure."

Then it goes on to say:—

"It is understood that such special agreements on the part of the United States will be made by the President of the United States, by and with the advice and consent of the Senate thereof; His Majesty's Government reserving the right before concluding a special agreement in any matter affecting the interests of a self governing Dominion of the British Empire to obtain the concurrence therein of the Government of that Dominion."

Now, as I say, there might well be a question, and I think we are bound to consider the possibility of there being a question raised, as to whether the provisions of article 4 of this Special Agreement under this treaty would survive the end of that treaty. Do I make that clear?

SIR CHARLES FITZPATRICK: Do you think there can be much doubt about that?

SENATOR ROOT: My opinion is that they do.

THE PRESIDENT: Your opinion is that they do survive?

SENATOR ROOT: My own opinion is that the provisions of article 4 constitute, in effect, a new treaty.

THE PRESIDENT: In article 4 they speak of any differences which may arise in the future, without any limitation of time. That seems to settle one of the points.

SENATOR ROOT: I think, both because, as the President has said, they expressly relate to any differences which arise in the future, and because they go outside of the function of a *compromis*, that they constitute in effect a new treaty, and that they would survive the



death of the treaty under which the Special Agreement was made. I refer to the question now chiefly in order that I may show that that is the view taken by the United States; and I understand the counsel for Great Britain to express, in behalf of Great Britain, the same view.

SIR CHARLES FITZPATRICK: That was clearly the intention of the parties.

SENATOR ROOT: I think it was. I understand the counsel for Great Britain to take that position; and, in behalf of the United States, I accept for the United States that position taken by the counsel for Great Britain, and express the agreement of the United States with that view.

THE PRESIDENT: May I ask counsel for Great Britain whether we understood the former enunciation by counsel for Great Britain in that sense? Perhaps it would be convenient to the Attorney-General to make another declaration.

THE ATTORNEY-GENERAL: I am sorry to say that I was engaged in another duty; I was writing a letter, and I did not catch Mr. Root's remarks, but I will make myself acquainted with their purport, and then I will make some further observation to the Tribunal.

THE PRESIDENT: If you please.

JUDGE GRAY: You will observe, Senator, that article 2 of the treaty of 1908 provides that:—

“the high contracting parties, before appealing to the Permanent Court of Arbitration, shall conclude a special agreement defining clearly the matter in dispute, the scope of the powers of the arbitrators,” etc.

That has some significance, has it not?

SENATOR ROOT: That, I suppose, would apply——

JUDGE GRAY: To the dispute?

SENATOR ROOT: I suppose it would apply primarily to the powers of this Tribunal.

SIR CHARLES FITZPATRICK: Yes, that is it.

1210 SENATOR ROOT: That was the idea.

THE PRESIDENT: Has not that which in the regular cases is the object of the special agreement to be made under article 2 of the general treaty, been done already by article 4 for this purpose? “the matter in dispute, the scope of the powers of the arbitrators” are defined by article 4.

“the periods to be fixed for the formation of the Arbitral Tribunal and the several stages of the procedure”

are also fixed by article 4. In referring to article 87 of The Hague Act, on p. 121, article 4 says that these contestations are to be referred to The Hague Court for decision by the summary procedure

provided in chapter 4 of The Hague Convention. And if we look at this chapter 4, "Arbitration by Summary Procedure," on p. 21 of the United States Case Appendix, there is in article 88 this provision:—

"In the absence of any previous agreement, the Tribunal, as soon as it is formed, settles the time within which the two parties must submit their respective cases to it."

So that although this matter, which, according to article 2 of the general treaty has to be defined by the special agreement, is regulated by article 88 of the summary procedure, as under special provisions for the time being fixed, the Tribunal itself fixes precisely this time. There is nothing left open. There is no question left open, I should think, to be fixed by the Special Agreement, and therefore it would not be necessary in that case.

SENATOR ROOT: The questions have got to be stated.

THE PRESIDENT: Yes; but is not that provided by article 4 already? Every difference which arises under these circumstances is to be submitted.

SENATOR ROOT: But you have got to define what the difference is, which is frequently a rather difficult thing to do. However that may be, that can be settled when it is reached. My object in referring to the question here was to clear away possible doubt which might cause controversy in the future, and to do it now before the award of the Arbitrators, because I should think that it might be very well in the award to fix the rights of the parties with some reference to this provision, so that it would not be left an open question.

DR. DRAGO: Perhaps this article 4 could be considered as disposing of the matter. It has been made under the provisions of the general treaty of arbitration. The general treaty of arbitration will expire after five years, and may or may not be renewed. But this article, created in virtue of the treaty which is to disappear shall continue to exist. The treaty could in that sense and in what refers to this particular matter be called *dispositive*, as the jurists say; it disposes of the matter; it is *transitory*, as they also call it, with a somewhat misleading name, inasmuch as there is no necessity of any other provision afterwards. The treaty of arbitration may pass, but the right or juristic relation created by it under article 4 shall continue to exist as a separate fact.

SENATER ROOT: Precisely.

DR. DRAGO (continuing): And the position of the parties as to future contentions which might occur relating to these fisheries will be regulated by it. I do not know whether I have made myself quite clear.

SENATOR ROOT: You have made yourself quite clear, Sir, and I fully agree with that; and I hope the Attorney-General does.



**THE ATTORNEY-GENERAL:** In reference to the question that the President was good enough to put to me, which I am sorry I missed at the time owing to my attention being directed elsewhere, I understand it to be as to whether the limit of five years, which appears in the general treaty of 1908, would put any term to the provisions of the Special Agreement of 1909.

**THE PRESIDENT:** Yes.

**THE ATTORNEY-GENERAL:** It seems to me that, so far as article 4 is concerned, certainly not. Article 4 is not limited by any term, 1211 but is expressly agreed between the parties as relating to the future, generally; so that it would not be a terminable article at all, so far as affects the subject-matter of that article.

**SENATOR ROOT:** Now, may it please the Tribunal, I have, in a very informal way, examined the effect of the British theory presented here in argument upon the practical situation as it exists in Newfoundland, and for that purpose have considered the nature of the British right as contended for by Great Britain.

I now ask the attention of the Tribunal to some consideration of the other side of the picture;—the nature of the American right as contended for by the United States, and the legal effect, as bearing upon the practical rights of the parties, in the prosecution of the industry to which the treaty relates, of the nature of the right of the United States as we deem it to be.

The first consideration which it seems to me lies at the bottom of any just view of the right of the United States is that it is a national right, and not a right of individuals. The treaty is a treaty made between sovereign and independent nations. The grant which the treaty contains is a grant to the United States. There is no privity of contract or estate between Great Britain and the inhabitants of the United States, or between the United States and the subjects of Great Britain.

We speak in a colloquial way about the grant of a fishing right, about the treaty granting the right to fish, and about the inhabitants of the United States receiving from the treaty the right to fish, but it is a colloquial use of terms. Using terms with the precision that is appropriate to a consideration of the legal consequences that flow from their use in a formal solemn instrument like a treaty, we must reject that very general and colloquial expression or series of expressions and consider what this treaty actually does. The contracting party with Great Britain is the United States of America, the nation, the sovereign and independent nation. What does it get under the contract made with it by Great Britain? It gets something, of course. It is plain upon the face of the contract what it gets. It gets the right that its inhabitants shall have for ever, in common with the subjects of His Britannic Majesty, the liberty to take fish of every kind upon

the treaty coast. The United States gets by the treaty granted to it the right that its inhabitants shall for ever have this liberty, a right of the highest national importance. The individual opportunity for profit is but incidental, subordinate. The thing granted, the great subject-matter of the treaty, what passed from one contracting party to the other contracting party, is the right of the United States to have this door of opportunity for ever open to its inhabitants; the great national right, subserving the great national interest, which led Great Britain, in this series of statutes before you, for a long period of years, before 1818, before 1783, to pay bounties, to induce its people to engage in this industry of fishing; so strictly national that Great Britain, and France, and the United States all tax the whole body of their inhabitants to raise the funds to induce citizens to pursue the industry. It is the national interest of for ever having open to the people of the nation the opportunity for profitable industry and trade; the national interest for which sovereigns in all the period of modern history have fitted out expeditions and made wars and treaties of reciprocity, and have subsidized steam-ship lines; and for which all over the world nations have been seeking to open doors to the inhabitants of their countries, holding open the door of the Orient, under common agreement with all of our countries, in order that the inhabitants of our countries may have the opportunity to enter into the profitable trade of the East. That is the national interest that was subserved, and that is the national right that was granted. It was also the right to a perpetual source of food supply for the people of the United States, the right to a nursery for seamen to defend the coasts of the United States, very great national interests that to-day are leading Great Britain to spend hundreds of millions in the creation of the greatest navy of the world to protect her food supply and to protect her coasts. That is what was granted by the treaty to the nation with which the treaty was made.

This was to a sovereign. And it follows necessarily, from the nature of sovereignty, that the right was held by the sovereign with the powers of a sovereign. It was its right. It was the right of the United States. There is a perhaps apparent analogy to a trust in form, but it is the trust of sovereignty. It is that great trust under which all the powers of sovereignty are held, a trust which differs from all municipal trusts in that there is no power to supervise or control it.

My friend the Attorney-General criticised a gentleman who was introduced here by Sir Robert Finlay as a very learned author, Mr. Clauss. Sir Robert was specially solicitous to know that the Tribunal had the book written by Mr. Clauss, and he quoted to the Tribunal not mere statements of fact by Mr. Clauss, but an  
1212 expression of opinion regarding the construction of instru-



ments which were supposed to create servitudes, as being well worthy the attention of the Tribunal. And he described Mr. Clauss as a learned author. Now when it appears that in this book, which the Tribunal has, there were statements of fact, of a great range of facts, and expressions of opinion which do not suit the British Case, my learned friend the Attorney-General flouts Mr. Clauss, and he rather criticises him for shrinking from giving a definition of sovereignty. The Attorney-General goes on to make a definition of sovereignty, and I am bound to say that when I read his definition I am inclined to think Mr. Clauss was wise, for the Attorney-General's definition is either defective or no definition at all. The definition by the Attorney-General [p. 1033] is—

“Sovereignty is the supreme governing power vested in some defined person or persons over all persons and things within the limit or under the control of a State. That is the modern view of sovereignty.”

If that means by the expression “within the limit of a State” within the spatial territorial sphere of the State, it excludes the very important range of sovereignty which is maintained generally on the continent, that is, the control over the person, the subject, the citizen, wherever he goes, and which we certainly do exercise, all of us, all countries in the Western civilised world, within the range of extra-territoriality, in the Oriental countries. If the words “within the limit of a state” do not refer to spatial extent, then we have no definition, because this amounts merely to saying that sovereignty is the power to govern all persons and things within the power of government; and the addition of the words “or under the control of a state” adds nothing to the definition, because it is merely expressing the same idea in different words.

Now, let me join Sir William in rushing in where Mr. Clauss feared to tread. I do it with more confidence, because there is no counsel to come after me, and I am sure that the Court will be judicial in its treatment of the subject. I am going to state what seems to me to be the modern idea of sovereignty, the universal idea, and base it upon the definition of a very great English thinker—I should say, although, of course, it is open to difference of opinion and dispute, the most accurate English thinker of modern times—and that is John Austin. Basing the definition upon what he says, I should say: “Sovereignty is the power to control, without accountability, all persons constituting an organised political community and the territory occupied by them, and all persons and things within that territory.”

The essential quality of the definition, which is Austin's, is the freedom from accountability to anyone, and that is the same idea, I

suppose, which is carried into the Attorney-General's definition by the word "supreme." That is the characteristic essential quality of the artificial person to which this grant is made, the nation, the United States. And the United States holds this great national right concerning a subject-matter of special interest to all sovereigns under the powers of sovereignty, which involve no accountability to any power on earth. It follows, necessarily, that this right of the United States, that its inhabitants shall have the liberty to take fish is a right which the United States can, so far as it and its inhabitants are concerned, deal with at its will. It can impose upon its inhabitants conditions to the exercise of the liberty that they may have; it may say to them, "You shall exercise that liberty only upon complying with such and such conditions." It may exclude part of them from it. It may include part of them in it. It may say, "You shall exercise it only at such times, and not at other times." It may say to them, "You shall exercise it only in such ways, and not in other ways." That is necessarily the result of this national right being granted to this sovereign, to be held under the trust of sovereignty, without accountability, for the benefit of its inhabitants.

SIR CHARLES FITZPATRICK: Is there not another necessary result—to protect them in the exercise of the right?

SENATOR ROOT: Only as every sovereign has a right to protect all its citizens in the exercise of their rights. But that is not a right of the treaty. It is not a right under the treaty. Wherever a citizen of Great Britain or of France, or of the United States, may go he is entitled to have the protection of his government for his rights. Whatever national right may exist, the nation has internationally the right to protect it, but not a right derived from a treaty—a right inherent in the independence of nations. When a British ship sails the ocean and is arrested, is attacked, the power of Great Britain can be used to protect it. It needs no treaty to give that power; the protection of it may be war,—not the exercise of a treaty right. When 1213 France gave notice to Great Britain, in the correspondence that is here, and that Mr. Turner referred to, that she proposed to enforce her rights on the treaty coast—rather a peremptory correspondence, the Tribunal will remember—and Great Britain answered back that she proposed to enforce hers, that did not mean the exercise of treaty rights. It meant war. When Mr. Evarts had this correspondence here with Lord Granville about the question as to whether we would be compelled to send ships of war to the treaty coast, that did not mean the exercise of a treaty right. It meant war. The treaty right, and the full extent of the sovereign right that comes to the United States under the treaty, is to deal with its own inhabitants.

SIR CHARLES FITZPATRICK: The power to regulate its own inhabitants.



SENATOR ROOT: Its own inhabitants, yes. We do not claim any right over British subjects that we deny to Great Britain over ours. I mean, we do not in respect of this very treaty right. Of course, we do not claim any such right in that vast field of jurisdiction which exists, because that is British territory, and which is not affected at all by this question.

JUDGE GRAY: The sovereign to whom this right is granted may also, following out your own line of argument, relinquish or destroy it by renouncing the treaty?

SENATOR ROOT: Precisely; it may relinquish or destroy it; and in this treaty it does renounce and destroy the right which it claimed to have, and had had under the treaty of 1783, in regard to the great extent of British treaty coasts other than this special reservation.

SIR CHARLES FITZPATRICK: Going back to the legal proposition, the power to regulate a treaty right to be exercised in foreign territory seems to me necessarily to involve the power to protect that treaty right, to protect the inhabitant in the exercise of that treaty right. Sovereignty must include that, surely, as a legal proposition?

SENATOR ROOT: It involves, not by grant of the treaty, but as the existence of every right involves, the right to make war in its defence; not a right granted by the treaty, but the superior and all-embracing right of independence to defend one's rights. We claim under this treaty no right whatever to the exercise of force in British waters. We say that as to this treaty right, with its narrow powers of sovereignty over the exercise of a liberty by our own citizens, and with regard to every right that the United States possesses, there may come a time when we shall be compelled to defend our rights; but we appeal to no treaty as the basis of that defence; it is because we are an independent nation, and it is essential to independence that at times a nation shall be ready to maintain its independence by maintaining its rights.

THE PRESIDENT: If you please, Mr. Senator Root: Is your proposition that American fishermen, in exercising their industry in British waters, only depend upon American sovereignty, and not upon the territorial sovereignty of Great Britain?

SENATOR ROOT: My contention is that American fishermen, exercising the liberty in British waters so far as regards the entire range of personal conduct, are under British sovereignty.

THE PRESIDENT: Yes, I forgot to qualify the question.

SENATOR ROOT: But so far as the method and time and manner of exercising that liberty, and the conditions upon which they shall exercise it are concerned, they are dependent upon their own government. They take no right from Great Britain. They take the right from their own government, which received from Great Britain the power to give them that right.

**THE PRESIDENT:** In this respect, the exercise of this industry would be different from the exercise of any other industry in British territory? If American subjects exercise any other industry in British territory, they are dependent upon the British laws concerning this industry; and with respect to the fishing industry, they are not dependent upon the British regulations concerning this specific industry?

**SENATOR ROOT:** I will show, I think with great distinctness, the reason of the difference, in a very short time. There is a clear and distinct line to be drawn. I indicated yesterday one element of difference.

**THE PRESIDENT:** The perpetual and unilateral character of the grant was one difference?

1214 **SENATOR ROOT:** That was the difference upon which I based my submission that, for the preservation of this kind of right it is necessary to have freedom from control; while for the preservation of the other kind of right it is not. That is one difference; and I shall presently come to the further differences.

It follows necessarily from what I have said regarding what the right was that passed to the United States under the contract, that there was in it no element of a transaction between juristic persons. Upon that both parties here are fully agreed, and the statements by counsel are quite unequivocal. I turn to one by the Attorney-General, who says [p. 1020]:—

“No, we did not part with the right to fish; . . . We consented not to exercise our sovereign right of exclusion against them for that purpose.”

That is the Attorney-General's description of what was done. The very full and frank statements by the counsel for Great Britain as to the limitation upon their sovereignty, which have characterized the entire argument of the case, standing upon Lord Salisbury's position as to limitation upon sovereignty, are quite inconsistent with the idea that this is a transaction merely between two juristic persons; because, of course, the mere passing of a private title is no limitation of sovereignty at all; absolutely none. But the subject is important, and it was raised by suggestions and questions from the bench, and I think that perhaps I ought to assign a rational basis for the agreement of counsel on both sides regarding it.

Under the Roman law we all know the sea was free to everyone, clear to the edge of the shore, and no one could acquire ownership or special rights in it. When the dreadful and brutal, selfish period of the Middle Ages came in Europe, and the advanced juristic learning of Rome was in a great measure forgotten, the different sovereigns reached out for general control over as great a part of the sea



as they could accomplish—narrow seas, and closed seas, and broad seas, and great stretches running out into the ocean, and this in some cases even went so far as to extend, practically, to a claim over the entire ocean.

But when the great duel between *mare liberum* and *mare clausum* was ended, when Grotius and his followers, representing the newly awakening spirit of commercial freedom that ushered in the civilization of our day, had overcome the conservatism and principle of exclusion represented by Selden, with all his learning and ability, when the principle of modern freedom had conquered, and the old claims to control and possession and ownership over the sea disappeared, they disappeared entirely: it is not that there was a residuum left; it is that they were gone. A very great English judge has stated what happened, in the case of *The Queen v. Keyn*, already referred to here, in the 2nd Exchequer Division. Lord Chief Justice Cockburn says:—

“All these vain and extravagant pretensions have long since given way to the influence of reason and common sense. If indeed, the sovereignty thus asserted had a real existence, and could now be maintained, it would, of course, independently of any question as to the three-mile zone, be conclusive of the present case. But the claim to such sovereignty, at all times unfounded, has long since been abandoned. No one would now dream of asserting that the sovereign of these realms has any greater right over the surrounding seas than the sovereigns on the opposite shores; or that it is the especial duty and privilege of the Queen of Great Britain to keep the peace in these seas. . . . It is in vain, therefore, that the ancient assertion of sovereignty over the narrow seas is invoked to give countenance to the rule now sought to be established, of jurisdiction over the three-mile zone. . . . To invoke as its foundation, or in its support, an assertion of sovereignty which, for all practical purposes, is, and always has been, idle and unfounded, and the invalidity of which renders it necessary to have recourse to the new doctrine, involves an inconsistency, on which it would be superfluous to dwell.”

That is to say, these vague and unfounded claims disappeared entirely, and there was nothing of them left as the basis for any claim of ownership or sovereignty or jurisdiction over any portion of the sea beyond the line that adjoins the land. The sea became, in general, as free internationally as it was under the Roman law. But the new principle of freedom, when it approached the shore, met with another principle—the principle of protection; not a residuum of the old claim, but a new independent basis and reason for modification, near the shore, of the principle of freedom. The sovereign of the land washed by the sea asserted a new right to protect his subjects and citizens against attack, against invasion, against interference and injury; to protect them against attack threatening their peace, to protect their revenues, to protect their health, to protect their industries. That is the basis and the sole basis on which is established the ter-

territorial zone that is recognised in the international law of to-day. War-ships may not pass without consent into this zone, because they threaten. Merchant-ships may pass and repass, because they do not threaten. But merchant-ships may not enter into the coast trade from port to port without consent, because they interfere with the industry of the people, the natural right of the people to carry on the intercourse between their own ports. Fishing ships may not come to engage in fishing, because they interfere with the natural industry of the people on the coast, the natural, immemorial right of the dwellers on the sea. Back in the remotest times, in all times, whatever be the rule of freedom of the sea, however free it may be, it is deeply embedded in human nature that the men who dwell by the shore of the sea consider that they have a natural right to win their support from the waters at their doors; and they look with natural resentment at one coming from a distance to interfere with that right; and that immemorial, natural right of the coastal population to secure support from the sea is an object of the right of protection by the sovereign.

That is essentially a relation of sovereignty. Efforts have been made at times by monarchs in former days, when the old theory of ownership prevailed, to separate some portions of the opportunity and grant them to individuals or corporations—special rights to fish, seldom, I think, out in the marginal seas or territorial seas, but in interior waters. However, those instances have been exceptional. The attempt unduly to restrict this great natural right of his subjects, and to create monopolies in particular places, was one of the great things that cost Charles I his head. Universally, now, the relation of the State to the fishing of its coastal population is the sovereign right of protection; and we are certified in this treaty that that is the relation of Great Britain, for in it she declares that this liberty which the inhabitants of the United States are to have forever is to be in common with the subjects of Great Britain.

Now, I say we are agreed upon this, and perhaps I should not discuss it further. It is the subject-matter of countless treaties regulating these rights, sovereign acts, the North Sea Convention, treaties with France of 1839, treaties of various and many powers with each other, all in the exercise of this sovereign right of protection.

The Act of 1878 of Great Britain puts the matter on a sound basis, "The Territorial Waters Act." It is in the British Appendix, p. 574. The second section of that Act says that an offence committed by a person on the open sea within the territorial waters of Her Majesty's dominions shall be punished, and so on, and then at the foot of that page there is a definition:—

"The territorial waters of Her Majesty's dominions, in reference to the sea, means such part of the sea adjacent to the coast of the



United Kingdom, or the coast of some other part of Her Majesty's dominions, as is deemed by international law to be within the territorial sovereignty of Her Majesty; ”

That is section 7 of this Act of 1878, The Territorial Waters Act, British Appendix, p. 574.

Despagnet has stated the rule very accurately in the work which is already in the hands of the Court. He says in section 411 of his work:—

“ But the reasons which justify the sovereignty of the state beyond the limits of its terrestrial territory are always the same.

“ Perels summarizes them in three principles:

“ First. The security of the adjacent state requires that it shall have exclusive possession of its shores and that it may protect the approaches.

“ Second. The surveillance of vessels which enter, leave, or sojourn in its territorial waters is imposed by the guaranty of efficient police and the advancement of its political, commercial and fiscal interests.

“ Third. Finally, the exclusive enjoyment of the territorial waters, *e. g.*, for fishing and coastal trade, may be necessary to secure the existence of coastal populations.”

The conclusions of the Institute of International Law at the meeting of 1894 contain what is supposed to be a correct statement of the relation of the State to this kind of right. The resolution adopted there is as follows:—

“ The State has a right of sovereignty over a zone of sea which washes the shore, subject to the right of innocent passage reserved in Article 5. This zone bears the name ‘ territorial sea. ’ ”

The President of the Tribunal will perhaps remember that in the debate which took place at that meeting of the Institute of International Law the original report of this resolution was a little broader, and it took the form “ a State has the right of sovereignty,” and that was modified in the final resolution by substituting “ a ” for “ the,” so that it read “ has a right of sovereignty.”

DR. DRAGO: I think a marginal breadth of six miles was recommended.

SENATOR ROOT: The Institute fixed upon a margin of six miles, I think.

1216. JUDGE GRAY: Recommended.

SENATOR ROOT: Yes, recommended a margin of six miles. Of course, I am referring to it with reference to the character of the relation of the State to the zone, whatever it is.

DR. DRAGO: Was there not a difference mentioned in the discussion, between the right of property on the marginal water and the imperium over it or right of sovereignty, so that the State could have the imperium but not the ownership?

SENATOR ROOT: That I understand to be the effect of the conclusion reached by the Institute of International Law.

Before leaving this subject let me put a third proposition. I have stated that this was a grant of a national right from one sovereign to another, that the relation which was involved was in no sense a relation of two juristic persons with each other, but the relation of two sovereigns dealing with the subject-matter of the sovereignty.

The third proposition is that this grant of this treaty must be construed and interpreted with reference to the fact that it was the settlement of a claim to a national right of the highest importance. That is the relevancy and materiality of the discussion regarding partition of Empire, and that is all. The bearing of that discussion is upon the construction which is to be placed upon this treaty, upon what we must consider to have been in the minds of the makers of the treaty, and as presenting the great salient fact with reference to the presence of which in the minds of the makers of the treaty we must construe and interpret their words.

This was the settlement of a controversy in which the United States had claimed that she was entitled for her people, to equal rights upon these coasts with Great Britain for her people, and in this treaty, a part of the rights regarding which that claim was made, and that controversy waged, were surrendered, and a part were continued, re-granted.

The renunciation refers expressly to the matter in controversy. Observe the recital:--

"Whereas differences have arisen respecting the liberty claimed by the United States for the inhabitants thereof."

Now the renunciation:--

"And the United States hereby renounce forever any liberty heretofore enjoyed or claimed by the inhabitants thereof. . . ."

A direct reference to the statement of the subject-matter of the controversy--

"and by the inhabitants thereof to take, dry or cure fish, on or within three marine miles of any of the coasts, bays, creeks or harbours of His Britannic Majesty's dominions in America, not included within the above-mentioned limits;"

And the new grant of the treaty covered a portion of the liberty claimed, and the renunciation of the treaty covered all the remainder of the liberty claimed. So I say it is not to be supposed that the makers of this treaty considered that they were going very far in making a grant of a right affecting this small portion of the coasts involved in the controversy as a right of the highest order of dignity.

The true nature of this right could not be better stated than it was stated by Lord Bathurst in his letter to Mr. Adams of the 30th October, 1815, which appears in the United States Case Appendix, and from which I will read, p. 274.



First let me say a word about the significance of the letter.

As we all know, Great Britain claimed, after the end of the war of 1812, that the right of the United States within her maritime jurisdiction had been destroyed by the war. We all know that Mr. Adams controverted this very vehemently, and this letter is the statement of the British ground upon which it maintained that position and refused to permit the United States to exercise the liberty which it had held under the treaty of 1783.

This is the formal authentic statement of the position of Great Britain under which she justified herself—was ready to justify herself to the world—for the denial of the rights which she had solemnly granted by the treaty of 1783 to the United States. It was the formal statement of the position of Great Britain in that controversy.

Mr. Adams, you will remember, had claimed that, because of this original right of the United States under the partition of Empire theory, the grant of the liberty or the right of 1783 was not ended by the war, but that it was an original right which continued, war or no war. That was Mr. Adams's position.

1217 Lord Bathurst is here controverting that position and stating the contrary position on which Great Britain stood, and he says in the first paragraph on p. 274:—

“The minister of the United States appears, by his letter, to be well aware that Great Britain has always considered the liberty formerly enjoyed by the United States of fishing within British limits, and using British territory, as derived from the third article of the treaty of 1783, and from that alone; and that the claim of an independent state to occupy and use at its discretion any portion of the territory of another, without compensation or corresponding indulgence, cannot rest on any other foundation than conventional stipulation.”

That is the basis of Great Britain's position in ending the “liberties” granted in 1783.

He proceeds:—

“It is unnecessary to inquire into the motives which might have originally influenced Great Britain in conceding such liberties to the United States, or whether other articles of the treaty wherein these liberties are specified did, or did not, in fact afford an equivalent for them, because all the stipulations profess to be founded on reciprocal advantages and mutual convenience. If the United States derived from that treaty privileges from which other independent nations, not admitted by treaty were excluded, the duration of the privileges must depend on the duration of the instrument by which they were granted; and if the war abrogated the treaty, it determined the privileges.”

You will perceive how material and necessary to the argument was this definition of the nature of the right that Great Britain had

granted to the United States. Other nations might exercise privileges at the discretion of Great Britain by acquiescence, subject always to be withdrawn or modified. Other nations might exercise privileges in the territory of Great Britain accorded by statute, always in the discretion of Great Britain to alter, amend, or repeal, but that an independent State shall occupy and use, *at its discretion*, any portion of the territory of Great Britain without compensation or corresponding indulgence cannot rest on any other foundation than conventional stipulation.

THE PRESIDENT: But then, must it not be expressed in the conventional stipulation that this right is to be exercised at the discretion of the party entitled?

SENATOR ROOT: The conventional stipulation which he is describing contained no such stipulation. He is ascribing that quality to the grant of 1783, which contained no such express stipulation.

On the following page (276) Lord Bathurst argues that this grant was temporary and experimental, and depending on the use that might be made of it, and so on, and on the condition of the island and the place where it was to be exercised, and on the general convenience and inconvenience, from a naval, military, or commercial point of view, resulting from *the access of an independent nation* to such island and places;—further characterization of the same description of the grant of 1783. And, as my learned friend the Attorney-General has argued so cogently here, the grant of 1818 was a continuance or renewal of a portion of the same grant as that of 1783.

Now I will come to another consideration, which is of primary importance in the construction of this grant, and that is, the quality imported into it by the use of the word “forever”—the quality of permanency. If you will remember, the United States insisted that this quality existed in the grant of 1783, and Lord Bathurst, in the letters which I have read, insisted that it did not exist in the grant, but the right was liable to be terminated by war.

You will remember the vehement assertion of John Adams in 1782 regarding the rights of the United States, and his unwillingness to enter into any treaty except one which secured these fishery rights.

The New England States in 1783 and in 1818 were poor, their soil was sterile, the great grain fields of the west had not been opened, the manufacturing which has grown to such great extent was in its infancy, and the fisheries were a matter of primary vital importance to the people of the United States, and especially to the people of New England.

Now, when the war of 1812 was ended, a war waged over the question of impressments, and not affecting the fisheries or involving as a matter of controversy the fisheries in any degree—when that war



ended without settling the question of impressments, without any particular credit to either side, the people of New England awoke to the startling and shocking realization of the fact that their fisheries, their great industry, were gone, provided Great Britain could maintain that position, unanticipated, unexpected, and a cause for chagrin.

1218 That is the explanation of the vehemence of John Quincy

Adams in conducting the controversy and the meaning of his deep feeling and indignation. The proposition of Great Britain that the grant of this right was not permanent was a blow at the vital interest of the New England seaboard, and an absolute pre-requisite and *sine quâ non* of the settlement of that controversy on the part of the United States was that, while she was forced to give up—while, under this argument of Lord Bathurst, she was out-faced, borne down and compelled to give up the greater part of the rights she had held under the treaty of 1783, the little remnant that she saved was to be made permanent beyond any possibility of doubt. That is a dominant feature in the article of the treaty of 1818, and it is one to which no Court can fail to give effect. It must receive effect, and it must receive the effect that all the conditions and circumstances show it was intended to have. The American instructions to the negotiators, which appear on p. 304 of the United States Appendix, are:—

“The President authorizes you to agree to an article whereby the United States will desist from the liberty of fishing, and curing and drying fish, within the British jurisdiction *generally*, upon condition that it shall be secured as a *permanent right*; not liable to be impaired by any future war.”

THE PRESIDENT: What is the connection between the perpetuity—the permanent character—of the right and its exemption from regulation by the State in whose territory it is to be exercised?

SENATOR ROOT: The connection is this. I assume I may now pass from demonstrating the importance and pressing nature of the demand for permanency and for the inclusion of the word “forever,” which, in numerous documents appearing here, is shown to have been a consideration in the negotiation. For example, in the letter from Mr. Robinson to Lord Castlereagh of the 10th October, 1818, the British negotiator reported, British Case Appendix, p. 92, that permanency was an indispensable condition on the American part; in the letter of Messrs. Gallatin and Rush to Mr. Adams of the 20th October, 1818, United States Case Appendix, p. 307, Mr. Gallatin says the insertion of the words “for ever” was strenuously resisted; in Mr. Gallatin’s letter of the 6th November, 1818, British Case Appendix, p. 97, he says that they could have secured more territory at the expense of giving up the word “forever,” and the report of Messrs. Robinson and Goulburn of the 17th September, 1818, British Case

Appendix, p. 86, refers to the right permanently conveyed. Now, the connection of that with the right of regulation is that there is only one way to give effect to this absolutely essential feature of the grant, and that is to regard it, not as an obligation, but as a conveyance of the right from Great Britain to the United States; so that it becomes the right of the United States and not a mere obligation of Great Britain, for all obligations are ended by war, and all obligations are ended by transfer of sovereignty.

THE PRESIDENT: Could there not be a perpetual obligation without a transfer of sovereignty?

SENATOR ROOT: There could not be a perpetual obligation not ended by war. The obligation ends with war, and the same obligation ends with a transfer of sovereignty. It must be remembered that sovereignty had been transferred as to thirteen British colonies, and it always must have been in contemplation that it might be transferred as to another. Lord Salisbury, in his speech in the House of Lords in 1891, declared, of the French right, that Newfoundland was mistaken in considering that the burden of the right was due to her continued allegiance to Great Britain, that wherever Newfoundland went that right would still persist, and I say there is no other way to give effect to this essential quality of the grant than to regard it as being not a mere obligation, but to regard it as being a transfer of the right from Great Britain to the United States, so that it became the right of the United States and not the right of Great Britain. To that feature of the article we are all bound to give effect, and we cannot put any construction on the article which leaves the right open to be destroyed either by war, or by a transfer of sovereignty, or by any other agency, unless it be the voluntary act of the grantee.

THE PRESIDENT: Then the consequence of the fact that this right has been acknowledged as a permanent right would be that the character of the right would be enlarged beyond the words of the grant itself? The grant itself speaks of the right of the United States to take fish, and in consequence of the fact that the right has  
1219 been granted for ever, it extends to a participation by the United States in the legislation and administration of Great Britain concerning the exercise of the right?

SENATOR ROOT: No, the right was not a grant to the inhabitants of the United States.

THE PRESIDENT: No, it was a grant to the United States for the benefit of the inhabitants of the United States.

SENATOR ROOT: It is a grant to the United States, and a right granted to the United States, of course, belongs to the United States. It is its right.



THE PRESIDENT: Is it not the essence of every international right that it belongs to the State? When you say that a treaty is made for the benefit of the inhabitants of the State, you mean that it confers the right on the State and not on the inhabitants? It is a contract, not between the inhabitants, but between the two States?

SENATOR ROOT: Precisely. This is a right of the United States, and it is a right which must persist for ever. The grant of a right for ever, independent of the promise of the grantor, made so by impressing upon it the quality of perpetuity, is a conveyance and is not a mere obligation. That is my proposition.

THE PRESIDENT: So that every right conferred on a State in perpetuity would be a conveyance and not a mere obligation; would convey a part of the sovereignty to the grantee State?

SENATOR ROOT: Every right conveyed to the State in perpetuity, so that it is not open to destruction, or impairment by the grantor, and relating to the use of the territory of the grantor, made in perpetuity, is a conveyance.

JUDGE GRAY: It no longer rests in promise, but it is an executed grant.

SENATOR ROOT: It no longer rests in promise, but is an executed grant. There is no other way to give effect to that quality that was imported, or expressed, by the word "forever." Of course, Great Britain stands upon the proposition that the territorial zone and the bays, creeks, inlets and harbours to which this right relates is a portion of her territory, over which she exercises sovereignty. That is the basis of her position, and I need not stop to argue it. So that the right which was conveyed to the United States is the right of one independent nation to make use for ever, for its own benefit in a prescribed area, of the territory of another independent nation. That is just as Lord Bathurst described it. It is in the nature of an international, real right; it is a *jus in re aliena*. We have here another reason why this should not be regarded as a mere municipal right, or a transaction between two juristic persons, because that has none of the elements of indestructibility. One of the essential qualities of this grant, and one which cannot be denied to it without violence to the terms of the grant, is that it is removed from the exercise of the powers of sovereignty of Great Britain, put beyond the exercise of that power, and is vested alone in the sovereign to which the grant was made. The sovereignty to which the grant was made, exercising its sovereign right, its sovereign control over its own right, not going beyond it, not arrogating to itself the right to interfere with British jurisdiction, or with the British exercise of a common right, but arrogating to itself the right to control its own inhabitants, to condition the right to them, is exercising that which is the right of the sovereign to which it is granted, and not the right

of the sovereign making the grant. That is the proposition I make.

Now, a further proposition upon which we are all agreed is that this grant did limit British sovereignty. That is agreed by counsel on both sides, and I suppose I need not spend any time over it. Originally, Great Britain had the right to reserve to her own subjects the exclusive use of that portion of the earth's surface which we call the treaty coast for fishing purposes. She had the right to exclude all other persons from it. She had the right to dispose freely as sovereign of the opportunity for the entire use among her own subjects, to condition its exercise, and to say that they shall do so and so, that these may go there, and that those may not. She had the right to admit such aliens as she saw fit to the beneficial use. She had the right to say to the people of Massachusetts: You may come here and fish, and to the people of Maine and New Hampshire: You may not, or that the people of New York may go and fish and the people of Massachusetts may not. But when she made the grant she parted to a material extent with the power to do those acts of sovereignty. She could no longer exclude this great class of 1220 men who are described as "inhabitants of the United States."

It rested with the United States to exclude them, or to prohibit them from entering that territory and fishing. She could no longer say to one: You may go, and to another, you may not. She could no longer dispose of the entire opportunity for fishing, as she had been able to do before.

Now, these are limitations upon the sovereign powers of Great Britain, and, while not extensive or alarming, or a matter of practical disturbance of British sovereignty, the United States, in conditioning her own inhabitants, saying: You may be admitted, and you not, those who comply with the conditions may be admitted, and others not, were entitled to exercise the same right of sovereignty which Great Britain had theretofore been able to exercise, and had exercised. So, sovereignty was limited.

Now, there cannot be an implied reservation in the grant of the very thing that the grant excludes; that is to say, that when the grant limited British sovereignty it excluded British sovereignty from the field of operation commensurate with the right granted according to its terms. It is not an exact use of words to call it an implied reservation. There cannot be any reservation implied of a right which the essential quality of the grant is to exclude. There is a limit to the grant, and beyond that limit sovereignty remains intact, unimpaired, and you must go to the grant to find what the limit is. If you find a limit in the grant there can be no implied reservation within it of any sovereign right, for to the extent of its limits the grant must limit the sovereignty, or the sovereignty must limit the grant. They cannot both limit each other. One must be



superior and the other inferior. The grant, to the extent of the terms of the grant, is superior because it limits the sovereignty, and when you have gone to the grant and found how far the terms of the grant go and the extent to which sovereignty is excluded, to that extent there can be no implied reservation of sovereignty whatever.

THE PRESIDENT: If it can be said on one side that there can be no implied reservation of sovereignty, can it not be said on the other side that there can be no implied abdication of sovereignty? The consequence would be that one must stick to the words of the treaty, and consider that it confers only that right which is expressed by *ipsissimis verbis* of the treaty.

SENATOR ROOT: That is undoubtedly true. The words of the treaty must be construed according to what is found to be their true meaning, and giving effect to all the words which are of consequence or of importance in the treaty. Of course, you have to find there an exclusion of sovereignty in the grant reasonably construed. The terms of the grant are general and without any limit except the limit of territory, and the limit carried by the fact that the rights are in common. The grant carries the right, to be held in common with British subjects, to take fish of every kind within this territory, and there is in it no power on the part of any one to say that the right shall not be exercised except where I choose that it shall be exercised, when I choose that it shall be exercised, or in the way that I choose it shall be exercised. That is the grant, and to that extent it excludes, pushes back the power of British sovereignty. Within that extent there can be no implied reservation. It rests with whoever claims to find in the terms of the grant authority on the part of the grantor to say to the grantee: You shall not do this except when I say, or as I say, or where I say, to show reason for it, to show ground for it.

Now, I will ask you to consider some of the grounds of such a claim which are presented. One of them, and one which has been pressed somewhat, is that there is an implication from the fact that the liberty is a liberty in common with British subjects. It is claimed by Great Britain that from that fact results a right of Great Britain to say that the citizens of the United States are to be subject to the same legislative control as the citizens of Great Britain. We must discriminate a little now. The personal conduct, of course, of the Americans who go upon the treaty coast is subject to the same control, but that is the result, not of the fact that the right which they go there to exercise is a right in common, but of the fact that they are in British territory; and the great field of control by Great Britain results not from the common quality of the right which they go there to exercise, but from the fact that they are there within British jurisdiction. In the next place, it should be observed, that it is the *right*

that the inhabitants of the United States are to have in common; it is not that it is to be *exercised* in common with British subjects. As Chief Justice Fitzpatrick observed yesterday in regard to the terms of the treaty of 1783, words were not used here loosely or carelessly. The men who drafted and settled this knew what they meant by the words that they used, and, of course, this right of the United States had been the subject of very careful and critical analysis. The

United States was being compelled to surrender a large part  
1221 of its right, and they, of course, used words with the greatest care for the purpose of securing a definite, and perpetual, and effective right. It was not by mere accident that they used the words "the inhabitants of the said United States shall have, forever, in common with the subjects of His Britannic Majesty, the liberty to take fish of every kind."

The natural inference from the fact that two nations have rights in common is not that one of them shall have entire control of both rights and shall determine when it is desirable for the common interest, that the rights shall be limited or modified. That is not the natural inference. The natural inference from the legal effect of the fact that two nations have common rights is that they shall have a common voice in modifying or changing the rights, and the real ground upon which the claim is made for an exclusive right in Great Britain to say what modifications shall be made in both of these common rights is not that the rights are common, but it is that it is her soil, her territory. The inference is not aided or added to in the slightest degree by the fact that the rights are in common: the inference from the fact that the rights are in common is all the other way.

I think I have already disposed of the idea that there is to be any inference, any implication, from the fact that it is within British territory, that British sovereignty controls the exercise of the right. I think I have disposed of that, and that is the sole ground for the contention that Great Britain can control the common right. The fact that the right is common adds nothing whatever to it.

But, let us examine a little further this idea, that the common quality of the rights of the two nations justifies one of them in controlling both. They are equal, and they are held by two equal independent sovereign States. The rights of one are of as great sanctity and dignity as the rights of the other. Great Britain is the sole judge of the time when, the places where, and the manner in which her rights shall be exercised. There is no equality whatever in having the subjects of Great Britain exercise their common right, or, to put it in the other form, in having Great Britain exercise her common right when she chooses, where she chooses, and as she chooses, and having the United States exercise her equal common right, not where and



when and as she chooses, but where and when and as Great Britain chooses. That is repugnant to the idea of equal common rights held by equal, independent States.

It is to be remembered that there are no limitations imposed upon the subjects of Great Britain by any superior power. The right of Great Britain is as ample and full to-day, after all these statutes, and notwithstanding these statutes, as it was the day after this treaty was made, when there were no regulations, no statutes whatever, affecting the fishing upon this treaty coast. The people of Great Britain, called subjects, who may exercise Great Britain's right, are not different from the law-making power of Great Britain. The laws are made by the Commons of England, the Parliament. They are stated, in theoretical form, as though made by the King, the traditional form coming down from great antiquity when Kings were supposed to hold by divine right the power to impose laws upon the people. But that is no longer the fact, and it was not when this treaty was made. If there be a statute passed by Parliament, or by any agency authorised by Parliament, such as a Colonial Legislature or a Fish Commission, to the effect that herring shall not be taken between October and April in a particular place, that does not affect the right of the people of Great Britain in any degree whatever. It is merely that they, of their own will, impose upon each individual member of that organized society this limitation upon the exercise of the right. They may repeal it to-morrow. There is still the right. The people of Great Britain may determine to exercise their right or not to exercise it—to exercise it in one way or another. It does not affect their right, and it does not affect our right. We may determine that we will not exercise our right; the United States may forbid its citizens to take fish on the coast of Newfoundland in October or May, or to take fish on Sunday or on Monday; that is voluntary; it has no effect and can have no effect upon the national right. The right persists, and the voluntary abstention, the self-denying ordinance, has no effect whatever upon the right of Great Britain and its subjects to take fish wherever they choose, how they choose, and however they choose upon the treaty coasts. It is no concern of ours, and it has no effect on our right, and affords no measure of our right whether they choose to take or not to take.

SIR CHARLES FITZPATRICK: Do you read the grant as conveying to the United States a right in the fish before they are taken?

SENATOR ROOT: I should hardly think so.

SIR CHARLES FITZPATRICK: It is a right to reduce the fish into possession?

1222 SENATOR ROOT: Yes, I think so.

SIR CHARLES FITZPATRICK: Until such fish are taken from the water they are the property of the territorial sovereign?

SENATOR ROOT: I would think that they were nobody's property.

SIR CHARLES FITZPATRICK: They are under the jurisdiction of the territorial sovereign.

SENATOR ROOT: They are within the special——

SIR CHARLES FITZPATRICK: They are within the territorial jurisdiction of the British sovereign?

SENATOR ROOT: Yes. We did try very hard to establish the idea of property in regard to fur seals, but Great Britain succeeded in defeating us in it.

SIR CHARLES FITZPATRICK: The right acquired was a right to take fish from the water and reduce them into possession.

SENATOR ROOT: The right we acquired was the right to have our inhabitants take fish from the water. Of course, when the fish is taken it becomes the property of the man who takes it.

SIR CHARLES FITZPATRICK: When it is reduced into possession it becomes the property of the inhabitant of the United States who takes it?

SENATOR ROOT: Yes.

THE PRESIDENT: Do you consider the right to be a right in common to the fishing territory between the United States and Great Britain, or is it rather that the inhabitants of the United States may take fish from British waters in common with the subjects of Great Britain?

SENATOR ROOT: It is a right in common of both States, because it is a right held in common for the inhabitants or citizens of both. They use the general expression that they shall have the liberty in common.

SIR CHARLES FITZPATRICK: I thought you said that the property in the fish, in so far as there can be property in it, and in so far as it is in the territorial jurisdiction of England, would be vested in British subjects, subject to your right.

SENATOR ROOT: After the fish had been taken.

SIR CHARLES FITZPATRICK: But until such time as the fish are taken, who has jurisdiction over the fish?

SENATOR ROOT: Great Britain has jurisdiction over the water and over the vessels and over the land. I do not know that they have any jurisdiction over the fish.

SIR CHARLES FITZPATRICK: And over the taking of the fish?

SENATOR ROOT: Yes, it has over the person who takes the fish.

THE PRESIDENT: Is there anything in the treaty which says that the right of the United States and the right of Great Britain is a right common to both States, so that the right of one State is equal to the right of the other State according to the subject-matter?

SENATOR ROOT: I think it follows necessarily from the fact that the right which they have is expressed to be a common right. Great



Britain, under that clause of the treaty, has the right to have her subjects exercise the liberty, and the United States acquires the right to have her subjects exercise the liberty, and that liberty is a liberty that they are to have for ever in common.

THE PRESIDENT: The Court will adjourn until a quarter-past two.

[Thereupon, at 12.15 o'clock, the Tribunal took a recess until 2.15 p. m.]

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AFTERNOON SESSION, FRIDAY, AUGUST 5, 1910, 2.15 P. M.

THE PRESIDENT: Will you kindly continue, Mr. Senator Root.

SENATOR ROOT: It follows from the nature of the right that was granted to the United States, quite independently of the question whether the grant to the United States must be treated as a conveyance by reason of the peremptory requirement of perpetual existence imported in the word "forever," and from the fact that this grant was to the United States, that when the inhabitants of the United States go upon the treaty coast for the purpose of exercising the liberty that they have, they go there by virtue of the authority which they derive from their own government, not by virtue of an authority derived by them from the British Government, availing themselves of a right which their country has internationally as against the general sovereign of the territory, by virtue of the grant which that general sovereign has made to their sovereign. The right which they exercise is a right that is therefore beyond the competency of the general sovereign of the territory—that is to say, Great Britain—to destroy or to impair or to change. It is a right which it is competent only for their own government to destroy or to impair or to change. That is equivalent to saying, in another form, that the right which they exercise is a right that they hold under their sovereign, and which that sovereign has acquired from Great Britain.

Under the way in which the exercise of this right has been treated by Britain, and in which it is the claim of Great Britain to be entitled to treat it, the American fishermen constitute a separate class by themselves, who, although Great Britain claims them to be subject to all her rights of municipal legislation, because the right that they have is a right in common, nevertheless are excluded from the real common exercise of the right. I hope I make it plain. It is that when the inhabitants of the United States go upon the treaty coast and exercise the liberty that is the subject of this grant to their country, under the view which Great Britain takes of the force of the words "in common," of the fact that the liberty is in common, they are treated as being a special class by themselves, not mingling with the population as in case of ordinary trade and travel rights, not really exercising rights in common, but exercising a special kind of right as a separate class, denied real rights of exercise in common;

they are not permitted to use the shore as British subjects can use it; they are not permitted to exercise the liberty of fishing in common with British subjects in so far as the exercise of the right of fishing involves the use of the shore for the drawing of nets or the setting out of traps, the drawing of seines; they are not permitted to use the shores for the purpose which was mentioned by one of the counsel for Great Britain here the other day as being important and serious, the disposal of the offal resulting from the dressing of the fish; they are not permitted to use the shore for the drying of their nets as British fishermen may—for the purpose that we can see illustrated any day here as we go towards the coast, by the great stretches covered with nets laid out to dry. They must confine themselves to their ships and their boats, and their seines or nets may rot through not being dried, or they must find some way to dry them as best they can on shipboard. They are excluded from the opportunity to employ labour as British fishermen may. They are excluded from the opportunity of obtaining supplies as British fishermen may, excluded from the opportunity to procure bait as British fishermen may. And in this great variety of ways they are prohibited from the real common exercise of the right of fishing. The inference from the fact that the right is in common is, in the view of Great Britain, an inference that it is to be common for purposes of restriction, and not common for the purposes of opportunity.

If the Tribunal should be of the opinion that the British view is correct, that the fact that this liberty is a liberty held in common with subjects of Great Britain means or requires the inference that its exercise is to be in common with the exercise of the liberty by British fishermen, so that the laws or regulations or rules imposed upon British fishermen may also be imposed upon American fishermen in respect of their right, then I submit that the Tribunal must find also that that common quality extends to the opportunities of British fishermen as well as to the limitations upon British fishermen.

There is a very good illustration, which I will ask permission to hand to the Court, and copies will be given to the counsel for Great Britain, of the way to make a real common exercise of the right of fishing, in the Russo-Japanese Convention concerning fisheries, of the 15th July, 1907.<sup>a</sup> I submit it to the Tribunal as an illustration of the view which I am now presenting. In that treaty it is provided:—

1224 “Article I. The Imperial Government of Russia grants to Japanese subjects, in accordance with the provisions of the present convention, the right to fish, catch, and prepare all kinds of fish and aquatic products, except fur seals and sea otters, along the Russian coasts of the seas of Japan, Okhotsk, and Behring, with the exception of the rivers and inlets. . . .

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<sup>a</sup> Appendix (I), *infra*, p. 1404.



"Article II. Japanese subjects are authorised to engage in fishing and in the preparation of fish and aquatic products in the fishing tracts specially designated for this purpose, situated both at sea and on the coasts, and which shall be leased at public auction without any discrimination between Japanese and Russian subjects, either for a long term or for a short term. Japanese subjects shall enjoy in this respect the same rights as Russian subjects who have acquired fishing tracts in the regions specified in Article I of the present convention.

"The dates and places appointed for these auctions, as well as the necessary details relative to the leases of the various fishing tracts shall be officially notified to the Japanese consul at Vladivostok at least two months before the auctions . . . .

"Article III. Japanese subjects who shall have acquired fishing tracts by lease in accordance with the provisions of Article II of the present convention shall have, within the limits of these tracts, the right to make free use of the coasts which have been granted to them for the purpose of carrying on their fishing industry. They may make on these coasts the necessary repairs to their boats and nets, haul the latter on land and land their fish and aquatic products, and salt, dry, prepare, and store their fish and other hauls there. For these purposes they shall be at liberty to construct thereon buildings, stores, cabins, and drying houses, or to remove them.

"Article IV. Japanese subjects and Russian subjects who have acquired fishing tracts in the regions specified in Article I of the present convention shall be treated on an equal footing in everything regarding imposts or taxes, which are or shall be levied on the right to fish and to prepare fishing products, or on the movable or immovable property necessary in this industry.

"Article V. The Imperial Russian Government shall not collect any duty on fish and aquatic products, cut or taken in the provinces of the coast and of the Amour. . . .

"Article VI. No restriction shall be established regarding the nationality of persons employed by Japanese subjects in fishing or in the preparation, &c.

"Article VII. With regard to the mode of preparation of fish and aquatic products, the Imperial Russian Government agrees not to impose on Japanese subjects any special restrictions from which Russian subjects are exempt, &c.

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"Article IX. Japanese and Russian subjects who have acquired fishing tracts in the regions specified in Article I of the present convention shall be placed on a footing of equality with regard to the laws, regulations, and ordinances at present in force or which may be enacted in future concerning fish culture and the protection of fish and aquatic products, the supervision of the industry connected therewith, and any other matter relating to fisheries.

"The Japanese Government shall be notified of newly enacted laws and regulations at least six months before their enforcement.

"With regard to newly enacted ordinances, notice shall be given thereof to the Japanese consul at Vladivostok at least two months before they go into effect.

"Article X. With regard to matters not specially designated in the present convention, but which relate to the fishing industry in the

regions specified in Article I of the said convention, Japanese subjects shall be treated on the same footing as Russian subjects who have acquired fishing tracts in the aforementioned regions."

That is an example of rights of fishing in common, and a recognition of both sides of the common right. They are to be expressly subject to the laws and regulations, and they are to be expressly entitled to all the privileges and opportunities of Russian subjects.

If the Tribunal should be of the opinion that the British contention is correct, I submit that the logical and necessary consequence of their contention as to the legal effect of making this fishing in common is that it carries common opportunity as well as common liability; and the restrictions and exclusions and differentiations between the exercise of a common right by Newfoundlanders and inhabitants of the United States must be wiped out. You cannot have one without having the other.

I now pass to the alleged implication of a right to restrict or modify the exercise of this grant by analogy to the grants of trade and travel rights in treaties generally; and shall seek to fulfil my promise upon the question asked by the President of the Tribunal this morning upon that subject.

From what does the idea arise that trade and travel rights granted by treaty to a foreign country for the benefit of its citizens are to be exercised subject to the laws and regulations of the country in which they are to be exercised? Counsel for Great Britain have placed great stress upon this, and Sir Robert Finlay put it as being a matter of common understanding that such rights are subject to regulation. The Attorney-General went farther, and said [p. 1001]:—

"The United States would not suggest that the captain of the ship would be entitled to say: Oh, my right to come here is territorial, you have not given me a mere ordinary trading obligation, you have given me a right to enter your gates, to stop on your soil, or in the water that covers your soil, and because it is territorial I am a specially privileged person.

"Such a contention as that would never be dreamed of, nor would it be dreamed of on the part of the commercial traveller who comes also under treaty. He comes there to compete with our own tradesmen and manufacturers in the sale of goods. He has a right to enter the gates of our territory, a right to remain there, a right to claim the protection of our laws, and he also would be entitled to say, You have put no restriction upon my right, look at your treaty. There are hundreds of these treaties passing continually under the observation of the lawyers who have to advise Governments in trading countries—hundreds of such treaties. We do not find any restriction saying, for instance, that a trader is only to trade on six days a week. The commercial traveller might say, I am not a Sabbatarian, I do not want a day's rest, your population may want a day's rest, I do not, and my treaty says I am to trade. Everybody knows that the commercial traveller, putting up such a claim, would



be derided. Nobody would suggest for a moment that such an obligation as that fails to carry with it all the laws which will attach to the exercise of local jurisdiction."

That is a full statement of the view. My observation does not agree with that of the Attorney-General regarding the interpretation of treaties. To begin with, under the condition of international law and practice as it was in 1818, the general, practically the universal, rule, in treaties granting trade and travel rights, was to include an express reservation of the right of municipal regulation and control.

If we turn to the treaties in our own record here—the Jay Treaty (British Case Appendix, p. 20), the treaty between Great Britain and the United States of 1794. It begins on p. 16. I read from the last paragraph in article 13, in which trading rights in the East Indies are given. That paragraph is:—

"And the citizens of the United States, whenever they arrive in any port or harbour in the said territories, or if they should be permitted in manner aforesaid, to go to any place therein, shall always be subject to the laws, Government, and jurisdiction of what nature established in such harbour, port, or place, according as the same may be."

And in article 14, which gives generally trading rights, the last clause on p. 21 is:—

"but subject always as to what respects this article to the laws and statutes of the two countries respectively."

The men who made that treaty understood that when governments granted even the temporary and reciprocal right of residence and travel, entry for ships, residence and travel for citizens, there should be an express reservation of subordination to the municipal laws and regulations. The unratified treaty of 1806 between the United States and Great Britain, in the American Counter-Case Appendix, at p. 19, grants trading rights, and provides (in the next to the last sentence in article 3):—

"And the citizens of the United States, whenever they arrive in any port or harbor in the said territories, or if they should be permitted in manner aforesaid to go to any other place therein, shall always be subject to the laws, government, and jurisdiction of whatever nature, established in such harbor, port, or place, according as the same may be."

The commercial treaty of 1815 between Great Britain and the United States, found in the British Case Appendix at p. 29, in Article 1, confers rights stated thus:—

"The inhabitants of the two countries, respectively, shall have liberty freely and securely to come with their ships and cargoes to all such places, ports, and rivers in the territories aforesaid, to which other foreigners are permitted to come, to enter into the same, and to remain and reside in any parts of the said territories, respectively ;

also to hire and occupy houses and warehouses for the purposes of their commerce; and, generally, the merchants and traders of each nation, respectively, shall enjoy the most complete protection and security for their commerce, but subject always to the laws and statutes of the two countries, respectively."

And in article 3, the provision regarding outlying dominions of the British Empire (reading from the last paragraph):—

"The vessels of the United States may also touch for refreshment, but not for commerce, in the course of their voyage to or from the British territories in India, or to or from the dominions of the Emperor of China, at the Cape of Good Hope, the Island of St. Helena, or such other places as may be in the possession of Great Britain, in the African or Indian Seas; it being well understood that, in all that regards this article, the citizens of the United States shall be subject in all respects to the laws and regulations of the British Government from time to time established."

I will hand to the Court and to counsel on the other side a paper containing printed copies of the articles containing the trade grants in a long series of treaties made between Great Britain and other countries, and between the United States and other countries prior to or in the approximate neighbourhood of the year 1818; and 1226 in all of them are express reservations of the right of the country in which trade and travel privileges are to be enjoyed by the citizens of the other nation to the exercise of that country's full right of regulation and the requirement of subjection to its laws.<sup>a</sup>

The United States treaties, which are taken from the volume of treaties and conventions that is available in every library, are with the Netherlands in 1782, with Prussia in 1785, with Prussia in 1799, with Great Britain in 1815, with Sweden and Norway in 1816, with Colombia in 1824, with Central America in 1825, with Denmark in 1826, with Sweden and Norway in 1827, with the Hanseatic republics in 1827, with Brazil in 1828, with Prussia in 1828, with Austria-Hungary in 1829, with Greece in 1837, with Sardinia in 1838, with Portugal in 1840, with Hanover in 1840, with the Argentine Confederation in 1853, with the two Sicilies in 1855, and with Great Britain in 1794—the treaty I have already referred to.

The treaties of Great Britain with other countries which contain similar express reservations: Treaty with Portugal, 1642; with Portugal, 1654; with Sweden, 1654; with Denmark, 1660; with Sweden, 1661; with Spain, 1669; with Denmark, 1670; with France, 1786; with Portugal, 1810; with the Netherlands, 1815; with France, 1815; with the two Sicilies, 1816; with the Netherlands, 1824; with Buenos Ayres, 1825; with Colombia, 1825; with Sweden, 1826; with Mexico, 1826; with Austria, 1829; with Frankfort, 1832; with Austria, 1838.

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<sup>a</sup> Appendix (H), *infra*, p. 1396.



It is plain to see where the idea originated that trade and travel rights are to be exercised subject to the municipal right of regulation and control; because it was the general practice of the world, in the treaties that granted these rights, during this formative period of the new regime of international intercourse and trade; it was the general practice to include in the treaties that limited the sovereign right of exclusion express provision for the application of the laws of the country that had limited its right of exclusion.

There are some treaties, a very small number, coming within these limits which had already begun to follow the modern practice, instead of making an express reservation, of establishing a standard by reference to the rights and privileges of the citizens of the state, or the most favoured nation. But the Tribunal will see that equally establishes a standard. The exercise of the right of the foreigner who comes in is to be measured by the exercise of the right by the citizen, or by the citizen of the most favoured nation; and nothing in the way of law or regulation affecting the exercise of his right can be objected to by him which is not in contravention of the standard of regulation of citizens, or the standard of regulation or control which is applied to the most favoured nation; and that is the common practice now, to put these treaty rights on the most favoured nation basis. And I venture to say that if the Attorney-General will look over again these hundreds of treaties, he will find that to be the case. If he goes back to this period regarding which we are treating, he will find the origin of the idea in express reservations, and coming down he will find the general rule, the establishment of a standard of treatment.

THE PRESIDENT: May I ask, Mr. Senator Root, if this disposition were not inserted, would the citizens of both parties have been extritorial? Was it the practice before the conclusion of these treaties that a citizen of one state, say of one European state who comes to any other European state, or a citizen of the United States who comes to one of the European states, was extritorial? Was it necessary to exclude extritoriality by a specific provision?

SENATOR ROOT: Not so far as the application of the ordinary jurisdiction was concerned, but so far as the treatment of the very right which he was exercising in the period concerning which we are dealing, it would have been, because there had not then developed what has been developed now, a universal recognition of a right—an imperfect right, to be sure; a right subject to the power of exception and withdrawal—but a universal right on the part of all mankind to free intercourse, travel, and trade. The growth of the principle of free intercourse and universal trade is a thing of recent years; and now there are two things to be considered regarding the exercise of such rights, though incorporated in a treaty. One is that the

enjoyment of the rights is practically necessarily subordinate to municipal regulation, because the enjoyment is through the instrumentality of private persons. When one comes to reside, he must get a place to reside. He gets a private title, he buys a house or hires a house; he secures a room in a hotel, and what he gets is the private title, and that of course is a title subordinate to all the laws and regulations of the country. When he trades he makes con-

tracts, and the person with whom he makes the contract is of  
1227 course subordinate, and the making of the contract must be in accordance with the laws of the country within which the

trading is done. So that practically the substantial enjoyment of rights of trade and travel is necessarily subordinate to laws and regulations. And there is no really practical subject-matter upon

which the question that we are considering can arise. The other thing to be said is that now these treaties are merely a recognition of an existing rule and right which is accorded without treaty to all mankind. We none of us produced any passports coming here.

We go at large through the civilised world, and except it be some particular country which has a special principle of exclusion for some class, and which wishes always to scrutinise for the purpose of deter-

mining whether we belong to that class, we are exercising the general right of modern civilisation, which is recognised generally as being for the benefit of all nations, and which no nation can afford to deny,

because the principle of commercial intercourse has taken the place of the principle of isolation. And, really, putting such a right into a treaty now is nothing more than practically a recognition of the

fact, a formal recognition of the fact, that the two countries are on terms of peace and amity, which the inhabitants may freely enjoy, and that there is no barrier to their exercise of the general rights

which obtain in all civilised countries. Such a treaty does serve, perhaps I should say in addition, to negative special grounds of exclusion which sometimes exist. For instance, both the United

States and Canada, while extending the freest possible hospitality to travel and residence and trade on the part of all the people of the earth, do make an exception based upon a special ground regarding

the coolies, the labourers from the Orient; and that is based upon a special ground which is recognised by the Oriental nations. It is that immigration *en masse*, which amounts to peaceful invasion of a

country by a great body of people who would take possession of, and occupy a portion of the territory to the exclusion of the natives, is different in kind from the exercise of ordinary travel and trade

rights; and upon that principle is recognised a specific right of exclusion not inconsistent with the according of the general rights of trade and travel. But as that custom of the civilised world which

gradually crystallises into the law of nations grows, more and more,



it is necessary for a nation, for its own self-respect, for the preservation of its standing among the nations of the earth, for the preservation of its own interests, for the continuance of those relations of intercourse, of trade, which are necessary to its existence in the family of nations, to give a reason for such an exception. The whole burden of proof has changed. Instead of giving a reason for admitting, if we exclude now we must give reasons for the exclusion. The strict right of exclusion remains, but it is a right that no nation can justify itself in exercising unless it has a specific reason. And the necessity of expressing a reservation of the right of municipal control over the privilege which is thus exercised freely by all the people of the earth, when an expression of the imperfect right of intercourse is put into a treaty, in my judgment no longer exists; but it did exist in 1818, because this general principle of free and universal intercourse and trade had not then reached its development; and it was through the rule, it was through the great range and practically universal custom of putting into treaties granting such rights, the express reservation of the right of municipal control that this general rule of intercourse among States grew up, and the people of the world became accustomed to it; and the custom, with all its incidents, grew out of this great range of conventions.

THE PRESIDENT: Could it not be said, Mr. Senator Root, that the very general recurrence of a disposition like this one—I have myself looked over these treaties of this period, and I have found none which does not contain a similar disposition—is rather the enactment of a recognised rule or a recognised principle of international law than the establishment of a new principle. Is not that one of the ways in which international law is developed—that generally recognised principles are put into treaties, are enacted in the written dispositions of treaties?

SENATOR ROOT: Certainly.

THE PRESIDENT: Was not that, perhaps one of these developments of international law, that the principle which was already recognised became expressed now in treaties?

SENATOR ROOT: I should put it rather the other way. That the general recognition of the principle followed the practice dictated by convenience of including the provision in the treaties, than that the treaties arose from the recognition of the practice; because I do not think that the practice existed at the time when the series of treaties began to put the provision in. I think the world had  
1228 not yet passed out of the period of isolation into the period of commercial free intercourse at that time. And I should say that the practice which we now enjoy was rather the result of the gradual adoption of the rule and putting it into this great number of

treaties, so that the world became accustomed to that arrangement of the rights of trade, and finally it became the universal custom.

Sir Robert Finlay also instances, as furnishing an analogy upon which we are to assume that the right of regulation existed, rivers and canals; and he asked who would say when the right to navigate a river or a canal is given, that it is not to be under the rules and regulations of the country in which the river or canal is. What rivers and canals? It is better to answer such a question as that with reference to the rights that are granted. Is there any universal custom under which rights to navigate rivers granted by one nation to another by treaty without any express reservation of the right to regulate the navigation, imply such a reservation? Is there any general custom to that effect? I know of none. Where will my learned friend find the rivers? The rivers of Europe are open to navigation under the provisions of the Congress of Vienna of 1815—that great landmark. And in that treaty there was a special and most elaborate series of provisions for the joint regulation of these rivers, with special reference to the convenience and the rights of the riparian States.

You will find quite readily in the rivers of Europe the basis for a supposition that the rights of a State navigating a river which passes through the territory of another State are subject to regulations; but it is the regulation specifically provided by treaty and by the commissioners provided for by treaty, as established by the Congress of Vienna.

In North America are there any such rivers? We have here in the record a reference to some. In the treaty of 1871, which is in the British Case Appendix, p. 39, in article 26, a provision as to the navigation of the River St. Lawrence, and of the rivers Yukon, Porcupine, and Stikine, and those are with express reservations of the laws and regulations of either country within its own territory, not inconsistent with the privilege of free navigation. In South America does he find any such rivers? I know of none. The Argentine Republic has made treaties under which she has thrown open the Parana and the Uruguay to navigation, but she expressly reserves the right of regulation, and the navigation is subject to the "regulations sanctioned or which may hereafter be sanctioned by the national authority of the Confederation." The Amazon is open to traffic not by treaty, but by decree of Brazil and of Peru; and of course those decrees afford unlimited opportunity for amendment, alteration, and repeal by the country in whose territory the river is. Bolivia expressly reserves the right of regulation on her water. The Orinoco is thrown open by decree on the part of Venezuela. Where does my learned friend find the rivers the navigation of which being subject to regu-



lation otherwise than by the navigating State furnishes an analogy upon which he may say that in this grant of a right to use this specific territory of Great Britain for the benefit of the United States there is to be implied a right of limitation and modification by the municipal regulation of Great Britain?

So about canals. It is difficult to see how anyone can navigate a canal except under the rules of the canal, any more than one can travel on a railroad except under the rules of the railroad. But the canals which we have reference to here in this treaty of 1871 are subject to an express reservation.

Article 27 of the treaty of 1871 is the only one to which we have been referred, and the only one that we know of, about the international use of the canals by the United States—the only one which we have in this record at all events:—

“The Government of Her Britannic Majesty engages to urge upon the Government of the Dominion of Canada to secure to the citizens of the United States the use of the Welland, St. Lawrence, and other canals in the Dominion on terms of equality with the inhabitants of the Dominion.”

And the reciprocal undertaking of the United States for the enjoyment of the use of the St. Clair Flats Canal is to be on terms of equality with the inhabitants of the United States.

And the provision regarding the several State canals is that the use is to be on terms of equality with the inhabitants, and so on.

Now observe that postulates the making of terms, which of course must be made with regard to the navigation of a canal; those terms are to be made, and the standard is that the terms are to be on equality with the citizens of the United States or of the Dominion.

An entirely different provision, you will perceive, in this 1229 treaty, which is not that the inhabitants of the United States shall use this territory for fishing purposes on terms of equality with the subjects of Great Britain, but that they shall have the “liberty” in common. It is a common right which they are to exercise, with no provision or stipulation whatever regarding the terms on which it is to be exercised, and no reservation which directly or indirectly in any way whatever points towards the imposing of any regulations or terms whatever on the exercise of the right.

There is a treaty, to which I referred yesterday—a fishing treaty—which illustrates the way in which such a reserved right of modification may properly be secured—the treaty between Austria-Hungary and Italy of October 1878.

That treaty provides as follows:—

“Maintaining expressly in principle for the subjects of the country the exclusive right of fishing along the coasts, there shall be reciprocally accorded as an exception thereto and for the duration

of this Treaty (regard being had to particular local circumstances, and, on the part of Austria-Hungary regard being had in addition to the concessions made in return by Italy) to Austro-Hungarian inhabitants and the Italians of the shores of the Adriatic the right to fish along the coasts of the other State, reserving therefrom, however, the coral and sponge fishery as well as the fishery within a marine mile of the coast, which is reserved exclusively to the inhabitants of the coast.

“It is understood that the Regulations for maritime fishery in force in the respective States must be strictly observed, and especially those which forbid the fishery carried on in a manner injurious to the propagation of the species.”

There is a real reservation, a reservation made as it would have been made in this treaty of 1818 if the makers of the treaty had intended that there should be a reservation of the right of control over the liberty to fish such as it was universal to express in the treaties of the time granting trading privileges to the citizens of one country in territory of another.

I now pass to my proposition that the makers of this treaty of 1818 understood the treaty in accordance with the American contention; that they had no idea whatever that the grant which they were making was subject to any power or authority of Great Britain to restrict, limit, modify, or affect it by subsequent legislation.

And the first circumstance which shows that is the circumstance to which I have just been referring in dealing with the subject of the analogy of trading treaties, that is, that these gentlemen who made this treaty in 1818 refrained from inserting in it the customary reservation of the time—the reservation which it was the practically universal rule of the time to put in when to one country was granted a right for its citizens to enter into and obtain benefits within the territory of another country.

You will have observed that I have quoted these express reservations in three treaties between the United States and Great Britain made prior to 1818—the treaty of 1794, the Jay Treaty, the treaty of 1806, and the treaty of 1815—that is, all the treaties that had ever been made between Great Britain and the United States granting rights to the citizens of one country to enter into and be relieved from the power of exclusion on the part of the Government of the other country.

Those are the three commercial treaties, three treaties granting trade and travel rights between the two countries, and they are all.

Now, would it not be extraordinary if these gentlemen who made the treaty of 1818, coming to grant these rights and intending that there should be a right of municipal regulation over the exercise of the right, should not put in the provision that was in every other treaty that had been made? They must have known of this great



list of treaties I have detailed. They were not ignorant persons. They knew something about the business in which they were engaged. They were not simple dull-witted English squires as the counsel for Great Britain might seem to have you think. They were men of exceptional ability and eminence. Mr. Goulburn was Peel's Chancellor of the Exchequer. He was the negotiator, not merely of the treaty of 1818, but of the treaty of 1815, one of the negotiators of the treaty of 1814, and the negotiator of the treaty between Great Britain and Spain of 1818—accomplished, able, eminent.

Mr. Robinson was of long experience in the diplomatic life of Great Britain. He had been Secretary to the British Embassy at Constantinople in 1807. He accompanied Lord Castlereagh to Paris in 1814 when Europe was rearranged diplomatically; he remained there with him until after the conclusion of the Treaty of Paris in 1815; he was Prime Minister of England as Viscount Goderich, and became Earl of Ripon.

Three of the men who made the treaty of 1818 made the treaty of 1815, in which this express reservation occurs; Robinson, Goulburn, both the British negotiators, and Gallatin of the American negotiators.

They could not have forgotten that. We know they could not have forgotten that, because this treaty of 1818 re-enacts and carries into its provisions the treaty of 1815. The fourth article of the treaty of 1818 is:—

“All the provisions of the convention ‘to regulate the commerce between the territories of the United States and of His Britannic Majesty,’ concluded at London on the third day of July, in the year of our Lord one thousand eight hundred and fifteen, with the exception of the clause which limited its duration to four years, and excepting, also, so far as the same was affected by the declaration of His Majesty respecting the Island of St. Helena, are hereby extended and continued in force for the term of ten years from the date of the signature of the present convention, in the same manner as if all the provisions of the said convention were herein specially recited.”

This reference to the declaration regarding the Island of St. Helena refers to the very clause of the treaty of 1815 from which I have read to you the express reservation of the right of municipal regulation.

So here you have in this treaty the same men who made the treaty of 1815, and who put into it the express reservation of the right of municipal regulation, re-enacting it here with that clause, and at the same time granting this right to the United States for its inhabitants to enter upon the territory of Great Britain, and subject it to their use—this right which Lord Bathurst has already called in the letter, which was the corner-stone of the negotiation resulting in the treaty, the right of an independent nation to enter and use at its discretion

the territory of Great Britain, and they do not apply any reservation to that right.

I say it is quite incredible that they should have refrained from following the custom—following their own custom—following the custom that obtained between the two countries employing the same familiar expression which they themselves had employed in the treaty they were re-enacting in regard to trade and travel rights, if they intended or dreamed of the idea that this right in the territory of Great Britain conveyed in Article 1 was to be subject to such regulation.

THE PRESIDENT: Please sir, was it not necessary to make, in the Treaty of Commerce for instance in 1815, a distinct disposition concerning the exception of foreigners? Was it not at that time, and I believe still in some of the States of the United States, and, if I am not wrong, in Great Britain also, the rule that foreigners cannot acquire landed property, and was it not necessary to make this exception? If this exception had not been made, then foreigners could have claimed the right to be proprietors of land. I believe, if I am not quite wrong, in the year 1815 neither the laws of Great Britain nor the laws of the United States admitted in general foreigners to be proprietors of land, or there were at least some dispositions discriminating between foreigners and citizens.

SIR WILLIAM ROBSON: In 1871 there was a statute permitting aliens to hold land in Great Britain; prior to that time aliens had no such right.

THE PRESIDENT: And for saving this discriminatory disposition, and probably other discriminatory dispositions between the rights of foreigners and citizens, it was perhaps necessary to insert in the Treaty of Commerce of 1815 a disposition like this, whereas, as to the exercising of the fishing industry, the subjects of both States should be treated on the principle of equality, in common, so that such a disposition was not necessary.

SENATOR ROOT: There undoubtedly may have been a variety of reasons for subjecting foreigners to the laws of Great Britain on the one side, and of the United States on the other; one of them may have had reference to the laws regarding alienage and title to property; but, it remains, nevertheless, that the method employed to bring about the subjection to the laws was this express reservation, and if it had been intended that the fishermen should be subjected to laws of Great Britain respecting their right, the same method would have been adopted.

I shall draw an inference from the observation of the President in favour of the position which I am taking, and that is, that they saw no reason why American inhabitants going upon the treaty



coasts to exercise their liberty should, in respect of that liberty, be subjected to the laws of Great Britain. However many reasons there may have been for subjecting the travellers and traders here, whatever the reasons were, they knew how to subject them, and the fact that they did not subject them on the fishing coast shows that they saw no reason to subject them.

THE PRESIDENT: But was there not one difference? Concerning the general right of aliens to enter foreign territory, to live in foreign territory, to exercise certain industries, there was the general intention of upholding certain discriminatory dispositions, whereas, as to the exercise of the fishing industry there was the intention of making no discrimination between foreigners and citizens, as they had the right in common.

1231 SENATOR ROOT: It may have been that the intentions upon the treaty coast were much more benevolent than they were in regard to the holding of real estate. Nevertheless, the fact that it was deemed necessary in the one case to expressly subject the foreign citizen coming into the territory to the laws holds good in the other. Whatever may have been the reasons for subjecting or not subjecting, the very object of subjecting was plain. And if they did not employ that recognised, customary, effective way of subjecting the foreign citizen to the laws and regulations of the country—whatever the reasons may have been—if they did not employ it, we are bound to infer that they did not intend to subject them.

The next consideration tending to show, tending very powerfully to show, that the makers of the treaty had no idea of subjecting the inhabitants of the United States to any restriction or modification of their rights, was that the negotiators had before them the example of the French rights. They knew (the evidence is here in this record) all about the French rights. Of course no one negotiating a treaty regarding the fisheries could have failed to know, to be familiar with, the French right. Mr. Gallatin, Minister to Paris, Swiss by birth, French his native language, one of the most acute and able men among the many whom the continent of Europe furnished to the formative period of the young republic across the Atlantic, he knew, of course. Mr. Rush, a man who, as Minister to England, stood against Castlereagh for the rights of South America, and collaborated with Canning that arrangement or understanding between Great Britain and the United States that brought forth Canning's famous remark that he had redressed the balance of power of the old world by bringing the new world into life; and the still more famous declaration of Monroe, of which our old friend John Quincy Adams really was the true author, no one can doubt Richard Rush's competency or knowledge of the subject with which he was dealing, and all these gentlemen of course knew, and these negotiators

had before them the fact that for more than a hundred years, on this very coast, the French had exercised the right of fishing granted in the same words, and never subject to regulation by the laws of Great Britain; never.

And, with that before them, is it credible that they conceived that there would be an implication of such a right on the part of Great Britain? With that before them is it credible that, if they had intended or supposed that there was to be such a reservation, they would not have expressed it? Would they not have followed this universal custom, and expressed it?

Now I beg you to observe, regarding the French right, that for seventy years before the treaty of 1783, France exercised this right. Before any declaration of 1783 France exercised the right, first under the Treaty of Utrecht, which said the French citizens shall be allowed, and then under the Treaty of Paris of 1763, which said the "subjects of France shall have the liberty of fishing."

Everybody knew, these negotiators knew, the question during that seventy years was not whether Great Britain could regulate France, but whether Great Britain had any right at all on the coast, whether France could not exclude Great Britain. Of course they knew that. This treaty of 1778 between the United States and France treats the French right as exclusive.

It is suggested here that these gentlemen had forgotten it. Forgotten the great event of the French Alliance! Forgotten that compact which alone enabled the United States to secure its independence! The two great facts that stood out in American history for everyone who approached the subject of diplomacy were the treaty of 1778 with France and the treaty of peace of 1783 with Great Britain.

The whole history of the French right is very fully displayed in the letter of Lord Salisbury, of 9th July, 1889, which appears in the United States Case Appendix, p. 1083. In that letter Lord Salisbury argues to M. Waddington, not for the British right to control the French fishery, but for the British right to participate in it. He says, in the third paragraph on p. 1083:—

"In my note of the 24th August, 1887, relative to this claim, I had stated that the right of fishery conferred on the French citizens by the Treaty of Utrecht did not take away, but only restricted during a certain portion of the year and on certain parts of the coast, the British right of fishery inherent in the sovereignty of the island. And in my subsequent note of the 28th July last I observed that the right of British subjects to fish concurrently with French citizens has never been surrendered, though the British fishermen are prohibited by the second paragraph of the Declaration of Versailles from interrupting in any manner by their competition the fishery of the French during the temporary exercise of it which is granted to them."



That is a specimen of the numerous contentions which are to be found throughout this long historical document, all of which go to the assertion that Great Britain had a right to participate as against the French assertion of their right to exclude British subjects. You remember Lord Derby's letter of the 12th June, 1884, in which he says that the grant of the French rights impressed upon the waters of Newfoundland something of the character of a common sea for the purpose of fishery. In the correspondence in 1886 we have a very illuminating exposition of what the real character of the French and English right was considered to be by Great Britain. I refer to the United States Counter-Case Appendix, p. 316, where will be found a letter from Count d'Aubigny to the Earl of Iddesleigh. It is dated 20th September, 1886:—

“My Lord: A decree of the Newfoundland Government dated the 9th August last, has prohibited lobster fishing for three years, from the 30th September next, in Rocky Harbour (Bonne Bay, ‘French Shore’).”

“I am instructed to inform your Excellency that, in view of the fishery right conferred on France by the treaties in the part of the island to which the Decree applies, a right which can evidently not be restricted in its exercise, it is impossible for my Government to recognize in any way the validity of the measure taken by the Newfoundland authorities.”

On p. 317 we have another from the French Captain LeClerc to Captain Hamond, a British captain, and in the last paragraph, p. 318, Captain LeClerc says:—

“I think it right to let you know that I am giving orders to vessels of my division to take no notice of a Decree which regulates a fishery the enjoyment of which belongs only to France.”

On p. 319 there is a letter from the Governor of Newfoundland to Mr. Stanhope, of the Colonial Office, in which he says:—

“Sir: In accordance with your instructions,”—

This is dated 24th November, 1886.

“I have communicated to my ministers your despatch of the 30th October, 1886, with reference to the lobster fishery on that part of the coast of Newfoundland where the French have fishing rights. . . . Though I have as yet had no communication from my Ministers on the subject, I may mention at once that there was never any intention of enforcing this Order against French subjects.”

On the 12th February, 1887, there is a letter, p. 320 of the United States Counter-Case Appendix, in which the Colonial Office of Great Britain, writing to the Foreign Office, says:—

“Count d'Aubigny appears to found his complaint on the fact that the French right of fishery cannot be limited by a Colonial Decree; but the position taken by Captain LeClerc is tantamount to a denial of the right of the Colonial authorities to issue any Decree binding

upon British subjects on matters concerning the fisheries on that part of the coast."

The Marquis of Salisbury writes M. Waddington on the 5th July, 1887, communicating the fact that he has received a formal assurance from the Government of Newfoundland that the prohibition is not to be enforced against French citizens.

Another question arose between the French and British which brought out some further correspondence, and, on the 23rd November, 1888, Lord Salisbury, writing to M. Waddington, in the letter which appears at p. 324, states the view of Great Britain regarding the French rights. He says, in the paragraph at the foot of the page:—

"Her Majesty's Government are unable to assent to the claim advanced by your Excellency that the French Government must be *sole judge* as to what constitutes such interference within the terms of the British Declaration of 1783.

"That is a question on which *both Governments have an equal right* to form any opinion, and as to which Her Majesty's Government have always endeavoured to meet the views of the French Government as far as was possible consistently with the just claims of the Colony."

That is the British view of the French rights, and that is the description of the rights as they existed, and as they were exercised prior to the making of the treaty of 1818. The limit of Great Britain's contention regarding them was not that she could regulate the French rights—that she repudiated—but that France was not the sole judge regarding the exercise of her rights, and that both nations had an equal right to form an opinion as to what constituted interference. These letters are long subsequent to the treaty of 1818, but they furnish an authentic statement of what the rights were, and a statement by the head of the British Foreign Office, who had made the most complete and exhaustive study of the subject of any of the statesmen of Great Britain.

It was well understood that the American rights, granted in the same terms, were, in effect, the same rights. Perhaps I should  
1233 here call attention to the relation of the British declaration of 1783 to the rights granted under the treaties of 1713 and 1763. I have already said that the terms of the treaty of 1763 were the same as the terms which contained the grant of the American right—"shall have the liberty"—and so forth. The treaty with France of 1783 granted no new right, made no change in the right. It changed the limits slightly, cutting off at one end and extending at the other. On p. 11 of the British Appendix, in article 5 of the French treaty of the 3rd September, 1783, is the provision:—

"His Majesty the Most Christian King, in order to prevent the quarrels which have hitherto arisen between the two nations of Eng-



land and France, consents to renounce the right of fishing, which belongs to him in virtue of the aforesaid article of the Treaty of Utrecht from Cape Bonavista to Cape St. John, situated on the eastern coast of Newfoundland, . . . and His Majesty the King of Great Britain consents on his part, that the fishery assigned to the subjects of His Most Christian Majesty, beginning at the said Cape St. John, passing to the north, and descending by the western coast of the Island of Newfoundland, shall extend to the place called Cape Raye, . . . . The French fishermen shall enjoy the fishery which is assigned to them by the present article, as they had the right to enjoy that which was assigned to them by the treaty of Utrecht."

The right in all that great part of the coast which was not affected by this renunciation on one end and addition on the other remained untouched, and the addition was to be upon the same basis as that which remained untouched; that is to say, it was the same right which was granted by the treaty of 1763.

Then, in the declaration, which Mr. Turner has very justly characterised as a modality, there is no additional right given to France—none whatever. The seventy years of exercise of this French right had developed quarrels and controversies between the French and the English. The French were claiming that their right was exclusive. The British were refusing to assent to that, but what Great Britain did do was to say:—

"The King having entirely agreed with His Most Christian Majesty upon the articles of the definitive treaty, will seek every means which shall not only ensure the execution thereof, with his accustomed good faith and punctuality, but will besides give, on his part, all possible efficacy to the principles which shall prevent even the least foundation of dispute for the future."

It was the execution of the existing treaty, and:—

"To this end,"—

That is to the end of executing that treaty.

"and in order that the fishermen of the two nations may not give cause for daily quarrels, His Britannic Majesty will take the most positive measures for preventing his subjects from interrupting, in any manner, by their competition, the fishery of the French, during the temporary exercise of it which is granted to them upon the coasts of the Island of Newfoundland; and he will, for this purpose, cause the fixed settlements, which shall be formed there, to be removed."

JUDGE GRAY: That language, "by their competition," is not in the treaty?

SENATOR ROOT: No, sir, it is in that declaration; and, of course, that language implies necessarily that there is competition, and that there is a right of competition. There is no surrender of the right. There is an agreement to do, for the purpose of executing the treaty precisely what Great Britain, in fact, did by the Act and Order-in-

Council of 1819 for the execution of the treaty of 1818, expressly ordering her people in Newfoundland not to interrupt the exercise of the treaty right by Americans. There is there on the part of France no right whatever except the right granted in the same words as the grant to the United States of 1783 and 1818, with a promise on the part of the King of Great Britain to make that right effective by prohibiting his subjects from interrupting the exercise by their competition.

They were quite well understood to be the same rights. I find, on p. 229 of the Appendix to the Counter-Case of the United States, that the Governor of Newfoundland, writing to Sir John Pakington, says, in the fourth paragraph:—

“The very terms of the Declaration in question whilst forbidding the English fishermen to interrupt by their competition, or to injure the Stages, etc., of the French, recognise their presence, and the whole question would appear to be settled by the concession on the part of our Government to the citizens of the United States in the treaty of 1818, of the same rights which had been conceded to the French in that of 1783.”

The Newfoundland Legislature, in resolutions adopted in 1876, appearing on p. 276 and following pages of the United States Counter-Case Appendix, said, in the paragraph which begins towards the bottom of p. 277:—

“That the rights of fishing involved in the absurd claims of an exclusive fishery by the French are not limited to the residents of Newfoundland; they are the rights of the other provinces of  
1234 British North America, and also those of the United States, to the latter granted them under their Treaty with Great Britain in the year 1818. England could not and would not have granted to the United States that which she had no right to grant, and much less would she deprive the inhabitants of the soil of rights she had granted to non-residents and to aliens.”

This French right was well understood to be the same as the American right before the exigencies of the situation led to refinement and subtlety, before lawyers began to argue about it and try to find fine distinctions between the two. Great Britain had conceded this right, expressed in the treaty of 1783, which was part of the same transaction with the American treaty of 1783, and relating to the same coast of Newfoundland, with confessedly no thought of regulation on the part of Great Britain, confessedly no idea that there was any possible right of regulation on the part of Great Britain, and these negotiators, knowing it all, proved by the record to have discussed it in their negotiations, to have discussed the whole subject of the fisheries, including the French rights, going on and repeating the language of the treaty of 1763, in making the grant



to the United States, put in no reservation of a right of regulation and control.

Is it open to us then to decide rights upon the assumption that these negotiators supposed that the grant to the United States would carry an implied right, an implied reservation of the right to do what never had been thought of with regard to the French right? Nor are we to suppose that the negotiators ever dreamed that Great Britain would want to regulate the fisheries. She was not regulating the French fisheries. Why should it be supposed that she would expect to regulate the American fisheries upon the same coast? There stands that great concrete fact which the negotiators could not ignore, and we cannot ignore, excluding any possible idea of an implied reservation or of an intention that there should be a reservation of the right to regulate.

THE PRESIDENT: May I ask one question, Mr. Senator Root, concerning the British conception of the French right? Was it necessary for the British Government to make any regulation concerning the exercise of the French right? In fact, they had recognized the exclusiveness of the French right. May I draw your attention to the last few words of section 1 of the British statute of 1788, which is the statute concerning the treaty with France, British Case Appendix, p. 561. I read four lines from the top of p. 563—

“also all ships, vessels, and boats, belonging to His Majesty’s subjects, which shall be found within the limits aforesaid, and also, in case of refusal to depart from within the limits aforesaid, to compel any of His Majesty’s subjects to depart from thence; any law, usage, or custom, to the contrary notwithstanding.”

Does it not follow from this statute that the British Government considered that British subjects had no right on that coast at all, and that, therefore, they had no reason to make regulations concerning that coast; whereas, with respect to the American fishery right, which was to be exercised in common by American and British subjects, there might be reason for the British Government to regulate.

SENATOR ROOT: That strengthens my argument, Mr. President, which is, that having before them the example of the French right, under which they had been compelled to abandon the practical concurrent use, or common use, and under which the effect of the grant had been wholly to exclude them from applying their laws and regulations to the French right, if they did not want such a result to happen under the grant to the Americans the British would, of course, have put in an express provision to prevent it from happening. My proposition is that the presence of this great French right and the annoyance, difficulty, turmoil, embarrassment which Great Britain had suffered from her exclusion from all practical control over this very coast, was a most cogent reason why, if the nego-

tiators had any idea of preserving the right of control, they would have put it in the treaty, instead of leaving the right to be expressed in the very terms which had been used in the grant to the French. That finishes what I was proposing to say regarding the inference to be drawn from the French right.

THE PRESIDENT: Have you finished what you intended saying concerning that point?

SENATOR ROOT: Yes; but may I say one further thing, not part of the argument? On the 20th June, the Tribunal requested 1235 the agents and counsel, *in camerâ*, to designate experts to be appointed as members of the Commission pursuant to the third article of the Special Agreement. The Agent for the United States immediately cabled to the United States to have an expert come. He came some little time ago and we have been waiting for some action to be taken to employ him. As so long a time has elapsed it seems to me appropriate that I should bring the matter to the attention of the Tribunal and say that the United States nominates for a member of the Expert Commission under article 3 of the treaty, Mr. Hugh M. Smith, Deputy Commissioner of Fisheries of the United States, who is here present and ready to perform his duties.

THE PRESIDENT: Thank you, sir. The Court adjourns until Monday at 10 o'clock.

[Thereupon, at 4.15 o'clock P. M., the Court adjourned until Monday, August 8th, 1910, at 10 o'clock A. M.]

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THIRTY-SEVENTH DAY: MONDAY, AUGUST 8, 1910.

The Tribunal met at 10 a. m.

THE PRESIDENT: Will you kindly continue, Mr. Root.

SENATOR ROOT (resuming): I wish to add to what I was saying about the example of the French fishing rights on the Newfoundland coast, as affecting the minds of the negotiators of the treaty of 1818, a reference to the observation of Sir Robert Finlay in his opening argument, which appears at p. 1204 of the typewritten report [p. 207 *supra*]. He said:—

“It is perfectly true that Great Britain did not frame regulations for the exercise by French fishermen of their rights upon the French shore of Newfoundland, and she did not do it for this reason. France throughout claimed that her rights upon these shores were exclusive. She asserted that in the strongest way. And, although that right was never admitted by Great Britain, it is perfectly obvious that Great Britain could not have undertaken the framing



of regulations for the exercise by the French fishermen of their privileges upon the coast of Newfoundland, without producing most serious friction with France."

That I believe to have been a just statement of the condition which existed from very early times, practically from the time of the Treaty of Utrecht of 1713, down to the making of the treaty of 1904 which so radically changed the relations between Great Britain and France upon that shore.

But, the fact that Great Britain found in her relations with France a reason for not framing regulations, whatever it may have been, whatever may have been the secret spring of policy which moved the Government of Great Britain, still leaves the fact standing, that in 1818, when these negotiators were re-granting to the United States the right that its inhabitants should have the liberty to take fish upon that coast, they had before them the example of a grant by Great Britain to France in those very words of a "liberty" to take fish upon those shores, and for 105 years that "liberty" had been exercised by France without possibility of regulation by Great Britain. And, if the negotiators intended that the right that they were granting to the United States should be different in respect of regulation from the right which had been granted to France, they should have said so then and there, and they would have said so then and there, in the treaty in which they made the grant.

I now pass, Mr. President, to the practice under the treaty of 1783 between Great Britain and the United States.

A schedule has been presented by the Attorney-General containing a reference to a great number of statutes upon which it is asserted on behalf of Great Britain that the rights of the United States to fish upon the treaty coast under the treaty of 1783 were subjected to regulation by Great Britain. That proposition I controvert, and I affirm upon the record that is here that the exercise of fishing right by the inhabitants of the United States upon the treaty coast under the treaty of 1783 never was subjected to regulation by Great Britain.

These statutes in the British Memorandum are arranged in 1236 order of date, without special reference to the countries, or without any complete separation in respect of the countries or colonies in which the statutes were enacted.

Let me first refer to the statutes which are said to have been passed in certain of the colonies now forming part of the United States, and which did in 1818 form part of the United States.

I do not consider that those statutes are relevant to the question whether American rights on the treaty coast were regulated under the treaty of 1783. Manifestly they are not. Their materiality is, I suppose, considered to be that their existence would naturally have

suggested to the negotiators the fact that fishing was a thing appropriate and proper to be regulated; a suggestion which we are not disposed materially to controvert; indeed, I intend hereafter to show that they did have specifically in mind the subject of regulation, and that they acted specifically upon it, and that there was a perfectly distinct understanding with regard to regulation. Nevertheless, I will make some remarks upon these American Statutes.

They did not contain any general scheme of regulation or suggest any general scheme of regulation. The first referred to are the Statutes of Massachusetts and New Hampshire. They appear upon p. 4 of the British Memorandum. And, they constitute a series of statutes which upon examination are designed to control the trade in fish, rather than the taking of fish.

There was one in 1668 that provided that no cod-fish should be killed or dried for sale in December or January; no mackerel to be caught except for spending while fresh before the 1st June. This was amended in 1692, or rather re-enacted in 1692, and in that form it has a preamble which is:—

“Upon consideration of great damage and scandal that hath happened upon the account of pickled fish, although afterwards closed and hardly discoverable, to the great loss of money, and also the ill-reputation on this province and the fishery of it.”

“No mackerel to be caught while fresh before first of July.”

And so on.

That is to say, they were endeavouring to keep up the standard of this great article of commerce by preventing fish being taken at such time that when it was put up or preserved to be kept and dealt with as an article of commerce it would be a bad article, and would destroy the reputation of the commercial article of the country.

JUDGE GRAY: I did not quite understand one word. The object was to prevent the fish after being taken from being prepared for sale?

SENATOR ROOT: The object was to prevent fish from being taken at such a time that it would not be a prime article of commerce. It was to prevent its being taken in the spawning season, because the fish is not a good article then. It was a kind of pure food Act rather than a fishery regulation.

Massachusetts was engaged in trade, and her great stock-in-trade was fish. The fish were caught and they were cured, dried, salted, pickled, put up in such form that they became an article of commerce.

Now, if the fish were taken when they were spawning they were a bad article of commerce, and when they were sold they destroyed the reputation of the pickled fish of Massachusetts: and, for the preservation of that reputation, and keeping up the standard of this great article of commerce, these statutes were passed.



Then there is the same sort of statute in New Hampshire, 1687. Here is the preamble:—

“Whereas much Damage hath been sustained and the Credit of the fishing Trade is greatly impaired by the bad making of fish, and disorderly acting of fishermen,” etc.

and the Act goes on to provide for the inspecting of catches and the curing of all fish. Then that has the same words, “No mackerel to be caught except for spending while fresh before 1st July; no mackerel to be caught with seines.” And so that was with the same purpose.

Then there is a statute, a series of them, of New Plymouth, which is now part of Massachusetts, one of the original colonies that entered into the constitution of the Colony of Massachusetts. The statutes of 1668, 1670, 1672, 1677, are statutes regulating fishing, only by either excluding outsiders from fishing, or letting them in to fish.

Then there is a statute, or two successive statutes in New York, relating to fishing in the County of Suffolk.

Now those are fish regulations. They are shore regulations of the most obnoxious kind. They are designed to prevent any market fishing at all; anybody coming from outside to interfere with the natives in taking fish.

1237 Perhaps it is a little clearer to me than it would be to some other readers, because I think I have fished over every bay, and every cove, and creek, and inlet in Suffolk County. It is the east end of Long Island, a place by itself, which, in those days, before there was any railroad, was almost self-governing under the sovereignty of the State of New York. And, they got the Legislature of New York to pass a law which would keep their fishing for themselves; the natives on the shore practically barred everybody else out. No person to draw any seine or net of any length, or set any seine or net more than 6 fathoms long, with meshes not less than 3 inches square, from the 15th November to the 15th April, in the bays, rivers, or creeks of the County of Suffolk.

Now, the observation I have to make about that is this: If these negotiators had ever heard of these little local regulations down at the east end of Long Island, far to the south, they would have undertaken not to permit that kind of regulation, but to prevent it. But, there was no general system of fish regulation of any kind.

Then there are, over on p. 13 of the Memorandum, three statutes cited, one of New Jersey in 1826, that is eight years after the treaty of 1818, which limited fishing to the citizens of New Jersey; one of Delaware in 1871, fifty odd years after the treaty, and I do not think we need trouble about that; and one of Maryland in 1896, nearly eighty years after the treaty.

Those are all of the American statutes.

Now, as to the Statutes of Great Britain and her colonies: In the first place there were proclamations in this Memorandum. Proclamations were succeeded by statutes and were superseded by statutes, and had been superseded by statutes long years before these treaties were made; and in the printed Memorandum which the United States has handed in your Honours will see that we have arranged these Statutes and proclamations under the heads of the Colonies to which they relate; Newfoundland by itself; Nova Scotia by itself; New Brunswick by itself; Lower Canada by itself.<sup>a</sup>

JUDGE GRAY: That is the arrangement of the British Memorandum, is it not?

SENATOR ROOT: No, they put all before 1783 in a series, containing all the countries, and then they put all between 1783 and 1818 in a series, and then all after that in a series, so when you come to read them there is a confusion of statutes with reference to their territorial application.

As an Appendix to this paper we insert an extract from a decision of the Supreme Court of Newfoundland in the year 1820, passing upon the validity and effectiveness of one of these proclamations which is printed in the British Case Appendix, and deciding that the proclamations had not the force and effect of law. They are gone. They are disposed of, as would naturally be the case. They are in their nature but preliminaries to the establishment of Government, and when a Governor has made a proclamation, and afterwards the legislative body comes and covers the subject by its enactment, of course that takes the place of the previous proclamation.

Many of these proclamations were made during the intervals of possession, which was afterwards given up by Great Britain to France, and, of course, sovereignty or possession changing, the proclamation in the previous occupation went by the board.

SIR CHARLES FITZPATRICK: That would not apply to proclamations issued under statute, by authority of statute.

SENATOR ROOT: No, it would not.

Now, I will refer to the regulation of fishing in Newfoundland. I will not detain you by going into all these details, because you have them in print. I will state merely the conclusions which I draw from them, and I hope you will not find that I have been unduly influenced by the attitude of counsel in drawing those conclusions, and that what I say is sustained by the facts that are pointed out.

I draw the conclusion first, that there was not, either in 1783 or in 1818, any regulation as to the time and manner of fishing on the coasts of Newfoundland or Labrador.

There had been in an Act of 15 Charles II, 1663, away back before France ceded Newfoundland to Great Britain, by the Treaty of

<sup>a</sup> Appendix (J), *infra*, 1909.



Utrecht, a curious provision about catching the spawn or young fry of Poor-John. It has been read several times. Poor-John, I believe, is a small variety of cod-fish.

That provision, however, was superseded by the Order-in-Council of 1670, which is in the Appendix to the British Case, and is cited here in this paper, which provided:—

1238 “That all the subjects of His Majesty’s kingdom of England shall and may for ever hereafter peaceably hold and enjoy the freedom of taking bait and fishing in any of the rivers, lakes, creeks, harbours or roads in or about Newfoundland.”

If it had not been superseded by that, it would have been superseded by the statute of 1699, which gives the same freedom to “all His Majesty’s subjects residing within his realm of England or the dominions thereunto belonging.” That Poor-John clause of 1663 was part of the restrictive policy of Great Britain in respect of the Island of Newfoundland. It was when she was trying to keep anybody from settling in Newfoundland, trying to preserve the fishing and the use of Newfoundland for fishing purposes, entirely for her own subjects dwelling in England, Wales, and Berwick-on-Tweed, and this was a provision that any planter or other person or persons remaining in Newfoundland should not do thus and so. When England abandoned that extreme restrictive policy and began to permit people to go to Newfoundland the statutes wiped out that among other restrictions. There had been also a provision in the Act of 1699 which was read here by Mr. Turner and commented upon, and which provided against the bounty fishermen.

THE PRESIDENT: Will you permit me, Mr. Senator Root, to draw your attention to the proviso that is contained in the Order-in-Council of 1670, p. 519, of the British Appendix. The second clause of this Order-in-Council seems to contradict the disposition concerning the taking of young fry in the statute of 1663, because there it is said:—

“That all the subjects of His Majesty’s kingdom of England shall and may for ever hereafter peaceably hold and enjoy the freedom of taking bait,” &c.

In a subsequent clause of the Order-in-Council of 1670 there is the following proviso:—

“Provided always that they submit unto, and observe all such rules and orders as now are, or hereafter shall be established, by His Majesty, his heirs, or successors, for the government of the said fishery in Newfoundland.”

Does not the proviso: “Provided always that they submit unto, and observe all such rules” as are now or may hereafter be in force, apply to the statute of 1663 and is not this disposition, under the head of No. 7 of the statute of 1663 maintained by this disposition of 1670?

SENATOR ROOT: I do not read it so. I read it in this way—such rules and orders as now are or hereafter shall be established; and then they proceed to establish them. You can see that it is immediately followed by a long series of orders.

THE PRESIDENT: Yes.

SENATOR ROOT: In that way you make consistency. In 1663 there had been a prohibition against—

THE PRESIDENT: Against a special kind of fishing.

SENATOR ROOT: That; and there is a prohibition against any kind of fishing as well. It is a broad prohibition against fishing. Now, here comes a broad declaration of freedom of fishing. It cannot be that the proviso was intended to repeal the main enactment, but you are perfectly consistent when you say that they refer to the rules and orders which they are now establishing in this Order-in-Council. Therefore they call them rules and orders and do not call them statutes. Thus it says that there shall be general freedom of fishing "provided always that they submit unto, and observe all such rules and orders as now are, or hereafter shall be established." Then they proceed in this very Order-in-Council to establish this series of rules and orders.

THE PRESIDENT: If the statute of 1663, No. 7, would be an entire prohibition of fishing in Newfoundland, then there would certainly be the contradiction you are alluding to, Mr. Senator Root, but does it not rather seem that the disposition of No. 7 of 1663 is not a complete prohibition of fishing but only a prohibition of taking spawn, or the young fry of Poor-John except for bait? It does not seem to be a total prohibition of fishing, but a prohibition of fishing within very restricted limits, and this prohibition within restricted limits might well be the one to which the proviso of the Order-in-Council of 1670 refers. It seems to be the same as the provision already existing, except the proviso that they must always submit to such rules as now are or may hereafter be in force.

1239 SENATOR ROOT: I tried to work out an understanding of this curious Poor-John provision along that line and, if that be the case, counsel for the United States need not concern themselves any more about it, for if it merely relates to spawn or the young fry of Poor-John, it is not a regulation of the industrial enterprise of fishing. That is not the kind of regulation with which we are dealing. It is the sort of regulation which applies to a small boy with his trousers rolled up paddling along the shore and taking the spawn or the little small fry of the fish.

THE PRESIDENT: Perhaps it is not of great importance, but this disposition seems to be a prohibition of a certain kind of fishing, and this proviso may be understood in the sense that this prohibition of a



particular, and perhaps not very important, mode of fishing is to be continued.

SENATOR ROOT: May it not be put in this way—that this provision No. 7 of the statute of 1663 either is limited to the taking of spawn and the young fry of Poor-John—and the words which follow all qualify that—that is the taking of spawn or the young fry of Poor-John “for any other Use or Uses, except for the taking of bait only”—and in that case we need not concern ourselves with No. 7 because it was not a regulation of the industrial enterprise of fishing; or it means to prohibit the taking of spawn or the young fry of Poor-John, the casting or laying of “any seine or other net in or near any harbour in Newfoundland, whereby to take the spawn or young fry of the Poor-John, or for any other Use or Uses, except for the taking of bait only?” In that case it would be so complete a prohibition of fishing that it would be repealed by this Order-in-Council. I am quite indifferent which construction is adopted.

But when we come to the Act of 1699 we find that if the Order-in-Council did not supersede this old Poor-John provision, the first article of the Act of 1699, I am quite clear, would have superseded it:—

“That from henceforth it shall and may be lawful for all His Majesty’s subjects residing within this realm of England, or the dominions thereunto belonging, trading or that shall trade to Newfoundland, and the seas, rivers, lakes, creeks, harbours in or about Newfoundland, or any of the islands adjoining or adjacent thereunto, to have, use, and enjoy the free trade and traffic, and art of merchandise and fishery, to and from Newfoundland, and peaceably to have, use, and enjoy, the freedom of taking bait and fishing in any of the rivers, lakes, creeks, harbours, or roads in or about Newfoundland.”

It covers the entire ground and plainly supersedes the provision of the statute of 1663, if it had not been already superseded. That is all I can find here which seems to have any characteristic as limiting or restricting the exercise of the liberty of fishing down to 1783. After 1783 there was the Act of 1786 which, as you will remember, was a Bounty Act, providing for the payment of bounty to vessels that went to the grand banks for the purpose of the cod fishery, and it provided in detail for the vessels taking cod going to the south coast of Newfoundland to dry and cure them. It is quite specific in its provisions, and in it there is a provision against fishermen “engaged in the said fishery,” that is the bounty-fed fishery on the grand banks, taking fish on the coast of Newfoundland, and limited strictly to them, that is all. There were provisions in these statutes which prohibited the throwing of ballast over into the harbours; which prohibited the throwing of gurry, or the offal of fish, overboard; which prohibited the casting or dropping of anchors, not fishing limitations,

in so far as anchors and ballast are concerned, but harbour protection regulations as to all ships of all kinds everywhere, coming for whatever purpose, and provision against net interference and theft of nets invariably associated in the same sentence. All of these are police regulations, and they constituted all there was in the way of regulation in Newfoundland either in 1783 or in 1818, or at any time between those dates and for many years after.

SIR CHARLES FITZPATRICK: There was the prohibition of fishing on Sunday contained in clause 16 of the Act of 1699.

SENATOR ROOT: That was repealed in 1775, as stated by Lord Elgin, in the letter which he wrote to Governor MacGregor at the time we were talking about the *modus vivendi*, so that did not exist. Lord Elgin, in that letter, states very clearly what the situation was after the treaty of 1818 was made. The Tribunal will remember that in 1855 there was a call made for a statement of all the regulations there were, for the purpose of presenting them to the United States for its consideration with respect to the application of the treaty of 1854, and that the Attorney-General reported that there were none.

My learned friend the Attorney-General fell into an error in 1240 regard to that report, he following, I think, Mr. Ewart, in supposing that the report was erroneous, or that the report was limited only to local regulations. The report was quite accurate. Senator Turner calls my attention, with reference to my answer to Chief Justice Fitzpatrick on the question of the Sunday prohibition of 1699, to the fact, and it does appear to be the case, that it was a Sunday observance provision which had no particular reference to fishing.

SIR CHARLES FITZPATRICK: The words are "shall strictly and decently observe every Lord's day, commonly called Sunday." It depends on what that means.

SENATOR ROOT: I have known of one fishing club where observance of the Sabbath was enforced by a rule against playing cards, but they fished, and another where the observance was enforced by a rule against fishing, but they played cards. I do not know what the construction of that would be, but, at all events, the subsequent statute of 1775 disposed of it in so far as fishing was concerned at least.

THE PRESIDENT: But does the statute of 1775 relate to fishing on the coast of Newfoundland, or does it not rather only refer to fishing on the banks? If one reads the preamble to the statute of 1775, p. 543, of the British Case Appendix, it seems to refer only to the fishery on the banks. It is, perhaps, not clear, but they speak only about fishing on the banks:—

"Now, in order to promote these great and important purposes, and with a view, in the first place, to induce His Majesty's subjects



to proceed early from the ports of Great Britain to the banks of Newfoundland, and thereby to prosecute the fishery on the said banks to the greatest advantage, may it please your Majesty that it may be enacted."

Then again—

"for eleven years, for a certain number of ships or vessels employed in the British fishery on the banks of Newfoundland."

They speak only of the fishery on the banks. Then, a little below the middle of the page, after having referred to the Act of King William III, they say—

"and shall be fitted and cleared out from some port in Great Britain after the first Day of January, one thousand seven hundred and seventy-six, and after that day in each succeeding year, and shall proceed to the banks of Newfoundland; and having caught a cargo of fish upon those banks."

Then again, some lines below:—

"Before the said fifteenth Day of July in each year, at the said island, with a like cargo, and shall proceed again to the said banks."

In the next line you again find the word "banks," and two lines below again the word "banks." In the whole of that statute they speak only of the fishery on the banks.

SENATOR ROOT: It was the same fishery. It was then, as it is now, all the same fishery. The fishery on the banks was the great object of the use of Newfoundland, and this statute of 1775, like all the previous statutes, in fact, treats them as a whole because the successful prosecution of the bank fishery required the use of the proximate shores, and I cannot doubt that the general provisions of the statute did operate to cover all persons such as were the British themselves and as were the Americans themselves, and as were all the British and Americans in 1783, and from 1783 to 1818—all those engaged in that fishery, the object of which was to take fish from the banks, and which employed and involved the use of the shores and waters of Newfoundland as an adjunct to its successful prosecution. Lord Elgin correctly gives, as we conceive, the opinion of the Government of Great Britain regarding this statute. His letter will be found at p. 986 of the United States Case Appendix, and it bears date the 8th August, 1906. He says at the top of p. 987:—

"Light dues were presumably not levied in 1818, seines were apparently in use, the prohibition of Sunday fishing had been abolished in 1776"—

That is a misprint for 1775, because it goes on to say "(see 15 George III, cap. 31)," which is the Act of 1775.

"and fishing-ships were exempted from entry at Custom-house, and required only to make a report on first arrival and on clearing."

1241 I think it is fairly reasonably to be said that when we came to the making of the treaty in 1783 there was a free hand for the prosecution of the industry such as was contemplated on the part of the American fishermen.

SIR CHARLES FITZPATRICK: May I ask you if you can tell me whether or not the new charter referred to at p. 529 of the British Case Appendix, relating to trade and fishery in Newfoundland, is printed anywhere? Referring to the passage about the middle of the page, I see the following:—

“And on the 27th of January, 1675, His said Majesty, after due consideration had of the best ways and means of regulating, securing and improving the Fishing Trade in Newfoundland passed the New Charter which recited and confirmed all the old Laws, and several others were added for the better Government of the Fishery.”

I have not been able to find it myself.

SENATOR ROOT: I have not found it the record.

SIR CHARLES FITZPATRICK: I do not think it is printed.

SENATOR ROOT: Unless it refers to one of these statutes.

SIR CHARLES FITZPATRICK: It is dated 1718.

SENATOR ROOT: No, Mr. Anderson tells me there is nothing in the record to which that corresponds. I was observing that my learned friends on the other side had fallen into an error in supposing that the Attorney-General of Newfoundland, in 1855, when he reported that there were no regulations as to fishing, was mistaken. The whole subject of Newfoundland appears to have been covered and codified in the Act of 1824, which you will remember, I presume—British Case Appendix, p. 567. This is:—

“An Act to repeal several Laws relating to the Fisheries carried on upon the Banks and Shores of Newfoundland, and to make Provision for the better Conduct of the said Fisheries for Five Years, and from thence to the End of the then next Session of Parliament.”

It goes on in the first article and repeals 10 and 11 William III, 15 George III, 26 George III, and 29 George III, and then covers the ground pretty fully. It reproduces the provisions of the old Act of 1688 regarding the French claims, the Act of 1819, and the Order-in-Council of 1819, all in one paragraph—12—bunching them together as being subject to the same general provision:—

“That it shall and may be lawful for His Majesty, His Heirs and Successors, by Advice of His or their Council, from time to time to give such Orders and Instructions to the Governor of Newfoundland, or to any Officer or Officers on that Station, as he or they shall deem proper and necessary to fulfil the Purposes of any Treaty or Treaties now in force between His Majesty and any Foreign State or Power.”

It reproduces the various prohibitions against the casting of ballast overboard, against the casting of anchor at places where it would



hinder the drawing of nets, against net interference, or stealing or purloining of nets or fish. All these are reproduced, but the statute wiped out all other provisions and laws applying to fishing. The statute, as you will see by the last article, at the top of page 570, is to be in force only for five years and thence to the end of the next session of Parliament. So that everything that there had been, in so far as it continued in the year 1818, was gathered together in this Act of 1824, and a five-year limit was put upon it. The reason was quite plain. They evidently then had come to the conclusion to give Newfoundland a legislative body of its own, and were making this statute so as to carry it over until there should be a legislature for Newfoundland itself.

At p. 329 of the United States Counter-Case Appendix, Sir W. V. Whiteway made an explanation in the House of Lords on the 23rd April, 1891, upon this subject. The Tribunal will find that in the last paragraph on p. 329 Sir William Whiteway refers to this Act of 1824, and says that in 1824 an Act entitled "An Act to repeal several laws," &c., contained two sections, 12 and 13, almost literally the same as those above quoted; that is, the sections which I have referred to as being in article 12 of the Act of 1824. Then he goes on, in the first paragraph on p. 330, to tell what happened to this Act, and says:—

"An Act was passed in 1829 to continue the Act 5 George IV chap. 51 last referred to, until the 31st of December, 1832;"

1242 That is, this 1824 Act was a five-year Act; when it was about to expire, Parliament passed another Act to extend it until the 31st December, 1832; and in 1832 the Act of 5 George IV, chapter 51, was further extended until 1834, and no longer.

"In 1832 a legislature was granted to Newfoundland."

A great year, 1832, for England—Legislature to Newfoundland; Reform Bill; new ideas were germinating, and bringing forth fruit there.

I continue reading:—

"Its first assembling taking place in 1833; and Parliament did not in 1834 further continue in force the law enacted in 1824, leaving to the Legislature of the Colony the task of passing laws and enforcing regulations to carry out the treaties and declarations."

So there we have the end of British legislation regarding Newfoundland. And until 1862 there was no Act passed by the Legislature of Newfoundland which in any way whatever could be deemed to touch this subject, except that in 1838 they passed a law prohibiting ballast being thrown overboard in the harbour. So that during all that period Newfoundland and Labrador were free from regulation or suspicion of regulation.

Now, as to Nova Scotia: In 1770 it appears by this Memorandum and by the Appendix to the British Case that there was a law passed prohibiting the throwing of gurry overboard for 3 leagues from the coast of Nova Scotia—a police regulation, and of course not applicable to anybody but the citizens of Nova Scotia, by the settled principles of English law. A statute of that description, which in terms extends beyond the territory of Great Britain, applies only to the subjects of Great Britain. I will not stop to cite authorities upon it. You will find the rule referred to by, I think, several of the judges in the case of the *Queen v. Keyn*, which has been so often cited here, in the Law Reports, 2 Exchequer Division, p. 63. It is of no particular consequence. It was a police regulation.

That is all there was in Nova Scotia in 1783.

Then there was, in 1786, a law passed to amend an old Act against obstructing the passage of fish in the rivers, an Act which by its terms was to last but one year, and which in the preamble said that it was an Act in addition to and amendment of an Act made in the third year of the reign of his present Majesty George III, entitled "An Act to prevent nuisances by hedges, weirs, and other incumbrances obstructing the passage of fish in the rivers of this province."

That Act undertook to remedy this interference with the run of fish up the rivers by authorising the local justices to make regulations regarding the manner of placing nets and seines in rivers, creeks, and so on. As I say, it lasted but one year; and there is no indication or evidence whatever that any such regulations were ever made, or if they were ever made that they were applied, or if they were ever applied that they were ever applied to any American.

So, when we come down to 1818, there never had been a statute in Nova Scotia which in any way affected the exercise of the liberty granted to the United States by the treaty of 1783.

Now, as to Prince Edward Island: There were no statutes of any kind. There are none cited in the Memorandum.

Lower Canada: Covering this great stretch of the Labrador coast from the banks of the St. Lawrence (indicating on map). In 1783 there had been no statute whatever. In 1785 there was a statute which related strictly to the regulation of the rights of the people who landed and used the beach, the shore of the Bay of Chaleur; and it did also contain a ballast provision against throwing offal into the sea within 2 leagues of the shore—extra-territorial. Of course that was because the shore people did not want the offal to be washed up on their shore, to be driven in, where it would become offensive. I say this statute relates specifically to the people who came to use the beach, the shore, on the north shore of the Bay of Chaleur, within



the Canadian limits; and does not extend itself out to sea at all, except by this ballast provision. That is all for Lower Canada.

So there was not, in 1783 or in 1818, or at any time between them, any provision in Lower Canada which in any degree regulated or affected the time and manner in which American fishermen might exercise their liberty.

There was in New Brunswick a series of statutes, that is, a statute with amendments, relating to the river and harbour of St. John, passed in 1793, a statute for the protection of river fishing, with clauses in it apparently for the protection of the harbour channels in the Bay of St. John, into which the river runs. The tides 1243 in the Bay of Fundy, the Tribunal will remember—and we are very proud of the fact—are the highest in the world; and the water rushes in and out with tremendous violence. This statute prohibited the running of nets out from the shore more than a certain distance. A careful examination of the statute will show that it relates to nets running out from the shore. They are to be not nearer together than so much, measured by a line parallel to the shore, and only so many lengths of net out from the shore. So that it is purely a river shore regulation. Nevertheless, there is a very interesting circumstance affecting this river regulation, to which I shall call attention before very long, and I will ask the Tribunal to recall the description that I have given, both of that Nova Scotia authorization for one year to magistrates to make rules for the protection of the run of fish in the rivers and this St. John river protection. The negotiators heard of the subject in the course of their negotiations, as I shall presently show.

Then there was in New Brunswick a statute containing a local regulation of the shore rights in Northumberland County, in the Bay of Miramichi, and authorizing local magistrates to make regulations. And there was in two of this series of statutes a Sunday regulation. Those laws were 1793, 1799, and 1810. I think I have fairly described them.

So the Tribunal will perceive that here, over this whole extent of coast, all of Newfoundland, east and south and west, all of Labrador, both the Newfoundland Labrador and the Canadian Labrador, all of Nova Scotia and Prince Edward Island, all of the south coast of this part of the Gulf of St. Lawrence which joins the River St. Lawrence—over all this tremendous stretch there was no regulation of the exercise of the American liberty of fishing, and there never had been any when this treaty was made in 1818. There was a river protection statute, up here in New Brunswick (indicating on map), up the bay, and there was in here, in New Brunswick (indicating on map) a Sunday regulation.

Of course, there is no evidence whatever that any American fisherman ever was subjected to that river regulation, or ever was subjected to that Sunday regulation. On the contrary, the evidence is full and satisfactory the other way. In the first place, the Tribunal will remember the very able and cogent argument of Sir Robert Finlay to the effect that the Americans did not fish in the bays at all prior to 1838. I think he brought down the absence of fishing in the bays to too late a date. He put it at 1838, in quoting Mr. Tuck—when Mr. Tuck had spoken of the time when the mackerel fishing was transferred from our coasts to the south up to the coast of the British possessions in North America, he had referred to a statute of 1828, and Sir Robert thought that that was a mistake for 1838. I do not think so. I think the beginning is marked by that statute that Mr. Tuck referred to of 1828. But there is no question whatever that back in 1818, and prior to 1818, Sir Robert's statements are perfectly correct. They practically were not fishing in the bays. What they were doing was fishing for cod-fish on the banks—all these banks running along here (indicating on map) outside the coast of Nova Scotia, along Sable Island and Banquereau, which the fishermen up there now call Quero, and up on all this series of banks clear up to the Grand Bank of Newfoundland. There was a bounty paid for cod-fish. They were cod fishermen. Herring fishery was unknown. Mackerel fishing had not moved up to these regions at all. There were plenty of mackerel down on the southern American coast below. And then their sole use for these coasts, aside from curing and drying was to get bait for their cod-fishing which earned them their bounty, and which furnished them with their great article of food and of trade. And they would come along these coasts to the banks, and run up to the nearest point where they could get bait to go back to the cod-fishery, and they would never run up into these bays. There was nothing to take them up there. They were fishing for cod, and all along these coasts which bore any relation at all to their voyages to the banks, or any of the banks for cod-fish, there was no regulation of American fishing whatever.

We have the evidence that Sir Robert Finlay has been good enough to furnish to us here to establish that fact, and the negative evidence that out of fifty-one cases, I think, of seizures of American vessels for all causes—a few of them before 1818—never one was in New Brunswick. There was never a seizure or a complaint or a suggestion of any regulation or of any contact between an American fisherman and the Sunday provision in New Brunswick up the bay, or over 600 miles around from their course to the banks in Miramichi.

We have still further evidence. The Tribunal will remember that in the report of the American Commissioners for the negotiation of



the treaty of 1818 they give an account of the renunciation clause and its effect. Permit me to read one paragraph of their report, from p. 323 of the United States Case Appendix. They say:—

1244 “It was by *our* act that the United States *renounced* the right to the fisheries not guaranteed to them by the convention. That clause did not find a place in the British counter-projet. We deemed it proper under a threefold view: 1, to exclude the implication of the fisheries secured to us being a new grant; 2, to place the rights secured and renounced, on the same footing of permanence; 3, that it might expressly appear, that our renunciation was limited to three miles from the coasts. This last point we deemed of the more consequence from our fishermen having informed us, that the whole fishing ground on the coast of Nova Scotia, extended to a greater distance than three miles from land; whereas, along the coasts of Labrador it was almost universally close in with the shore.”

That was the situation. That means all of this coast along on the way up to the fishing banks (indicating on map).

We had in 1855, the Tribunal will remember, a consideration of regulations which led to the Marcy circular. And there are some things rather interesting there, in the account of the correspondence and interviews regarding those regulations. On the 5th May, 1855, Manners Sutton, the Lieutenant-Governor of New Brunswick, wrote to the British Colonial Secretary a letter which appears at p. 204 of the British Case Appendix. Lieutenant-Governor Sutton says that the time is approaching when the United States fishermen will come into the waters of New Brunswick to take fish, and he thinks it is desirable that they should be made acquainted with the laws and regulations which existed at the time the treaty was made; and he tells in general what they are. He says, after referring to such and such provisions of the Revised Statutes of New Brunswick, that by a certain provision of the Revised Statutes the Justices in Sessions of each county in the Province “are invested with the power to make regulations,” &c. And then he says:—

“I am not as yet in a position to furnish your Lordship with the particulars of all these Regulations, but I hope to be able by the next mail to send to your Lordship a complete set of all the Laws, Bye-Laws and Regulations, respecting the fisheries of this Province.

“It is impossible to expect that either the fishermen or even the Government of the United States should be aware of the nature of the local Regulations on this subject, even if they are cognisant of the provisions of Provincial Statutes.”

Then he submits whether it is not desirable that he should receive instructions to forward to Her Majesty's Minister in Washington copies of the laws and regulations. That is approved by the Colonial Office, in a letter which appears at the top of the next page from Lord John Russell to the Lieutenant-Governor of New Brunswick; and Lord John Russell transmits, in that letter to the Lieutenant-

Governor, five copies of the laws and regulations in force in the British North American provinces with reference to the fisheries. Then Mr. Manners Sutton, when he gets these five copies, writes to the British Minister at Washington a letter, dated the 16th June, 1855, on the same page, 205, of the British Case Appendix, and in that he says:—

“The statutory regulations are contained in one Act: ch: 101—title 22: of the Revised Statutes of New Brunswick.—

“The local regulations, are of two different kinds—1stly those, which, under the provisions of the 6th secn of the Act: referred to, have been made by the Governor in Council; & 2ly those which the Justices in Session of the respective counties are empowered, by the Provincial Act—ch: 64 title 8: of the Revised Statutes to make for the govt of fisheries within the rivers of the several counties.—

“The local regulations of the last mentioned description, altho’ issued in many counties, & having the force of law, were not included in the collection, published from H.M’s Stationery Office in 1853, because, as appears from a despatch from Sir E. Head to the Duke of Newcastle, which is printed in page 37 of that paper,—of which yr Ex no doubt has a copy,—these regulations were at the time considered to be immaterial, inasmuch as they do not affect the outside fisheries.”

Then he goes on to say he thinks that they ought to be included and made known. This paper, which he sent on, is what Lord John Russell sent him from the Colonial Office. So the Tribunal will perceive that if these magistrates made any local regulations, they were of such a character that they did not affect outside fishermen, and they were not printed, so that anybody could ever know what they were. They were not included in the printed copy of laws relating to fishing.

Still further: Mr. Crampton, the British Minister at Washington, transmits the laws which Mr. Manners Sutton had—

JUDGE GRAY: Pardon me, Mr. Root: Do I understand, in the middle of the next to the last paragraph of that letter from which you read on p. 205 of the British Appendix, that the language—

“These regulations were at the time considered to be immaterial, inasmuch as they do not affect the outside fisheries.”

referred to the bank fisheries?

1245 SENATOR ROOT: I should suppose not. I should suppose that they did not affect any fisheries except those of the inhabitants; the fishery as carried on from the shore.

JUDGE GRAY: They do not affect the outside fisheries?

SENATOR ROOT: They do not affect the fisheries by outsiders.

JUDGE GRAY: That is just what I wanted to get at—what the meaning of it was: as to whether it was fisheries by outsiders, or fisheries that were outside of these waters.



SENATOR ROOT: That is what I suppose to be the reason. At all events, the point is that they were not published; they were not included in the publications of the fishery laws relating to the provinces, and the reason is that they did not affect the outside fisheries. Whether that means the bank fisheries, or whether it means the fisheries by outsiders, I do not know. I should think that the latter would be the more complete reason for not publishing them.

SIR CHARLES FITZPATRICK: It means they are not published from Her Majesty's Stationery Office, I think; that is all that is contained in this letter.

SENATOR ROOT: That is where he sent to get them.

SIR CHARLES FITZPATRICK: Yes. Her Majesty's Stationery Office, of course, is in England. Local regulations are not usually published.

THE PRESIDENT: Perhaps "outside fisheries" is used in contradistinction to river fisheries. The following sentence leads me to that supposition:—

"But your Excellency will observe that they do, in some instances at least, affect the fisheries in the harbors of this province, which are now thrown open to the fishermen of the U.S. as well as the river fisheries, which are reserved to H.M.'s subjects."

SENATOR ROOT: Yes; I think that does have a bearing upon it; that is, that they did, in some respects, protecting the rivers, run the provisions into the harbours.

THE PRESIDENT: At first he considers them as not important because principally they had referred only to river fisheries; but in some respects they might also affect the harbour fisheries, and therefore he considers them also, now, as material. That seems to be the meaning.

SIR CHARLES FITZPATRICK: The very first paragraph makes the distinction: "the outside fisheries" and "the fisheries in the harbours."

SENATOR ROOT: Well, he sent the statutes to the British Minister at Washington, who sent them to Mr. Marcy, and Mr. Marcy examined them and approved them. And what were they? There is only one that can be deemed to be a re-enactment or representative in these revised statutes of any of these laws prior to 1818. There is no Sunday provision. At the foot of p. 207 of the British Case Appendix, the Tribunal will find them attached to Mr. Marcy's first circular. There is a gurry ground provision; there is a spawning ground provision on the Grand Menan; and there is a provision relating to river protection in certain parishes of New Brunswick.

That is all down to 1855. That is all the provisions which were deemed worthy to be brought to the attention of the Government of the United States as bearing upon the exercise of the liberty granted by the treaty of 1854 on those coasts: two provisions passed after 1818; and the one which we find a trace of before 1818, and which I

dare say came down in the revised statutes, was a provision for river protection.

THE PRESIDENT: Is not that No. 15 for the establishment of a close season? "No herring shall be taken between the 15th of July and the 15th of October in any year."

SENATOR ROOT: On the spawning grounds.

THE PRESIDENT: Yes. It was a close season.

SENATOR ROOT: Yes, on the spawning grounds. And it was approved, and properly approved, by Mr. Marcy when presented to him. And the Tribunal will observe it was presented to him with this understanding, which appears in Mr. Crampton's letter of 27th June, 1853, to Mr. Manners Sutton, which will be found on 1246 pp. 205 and 206 of the British Case Appendix. The Tribunal will observe in that letter, at the top of p. 206 of the British Case Appendix, that Mr. Crampton says:—

"Mr. Marcy entirely concurs with me in the opinion that such a measure would be calculated to prevent the occurrence of any misunderstanding on the part of American fishermen, who may now resort to New Brunswick for the purpose of exercising their newly acquired rights under the Treaty of Reciprocity, and proposes that, after the documents—with which Your Excellency is about to furnish me—shall have been examined by him, and shall have been found, as he doubts not will be the case, *to contain no provisions inconsistent with the full enjoyment of the American citizens of the rights of fishing* secured them by the Treaty, and to direct the 'Collectors of the United States' Customs' to furnish copies of the same to the masters of all the vessels clearing from American ports to the British fisheries."

That is the proposition on which these laws were presented to Mr. Marcy for his consideration and approval: the proposition that their provisions were not inconsistent with the full enjoyment of the American citizens' rights of fishing secured to them by the treaty. And, indeed, a provision might well be approved which prevented the throwing of gurry overboard except at a particular place, and which protected the spawning ground, and which protected the rivers of New Brunswick in which we had no right to fish.

But the paucity of regulation twenty-seven years after the treaty of 1818 was made is what I call the attention of the Tribunal to now, as tending to support the statements which I have made regarding the existence of any system of regulation in 1818 or at any time prior to that time.

One other thing is to be observed. Mr. Crampton, in his letter of June 1855, which appears on p. 206 of the British Case Appendix, says:—

"I have thought it right to bring this matter under the immediate attention of the Governor-General of Canada, and the Lieutenant-Governors of Nova Scotia, Prince Edward Island, with a view to the



adoption of a similar arrangement in regard to the fisheries of those provinces, to that now proposed, in regard to the fisheries of New Brunswick;—I have the honor to enclose herewith the copy of a letter which I have addressed to their Excellencies for that purpose.”

Then follows the letter of the 28th June, 1855, on pp. 206 and 207 of the British Case Appendix, from Mr. Crampton to all these governors; but that produced no regulations whatever.

So that down to 1855, in all this stretch of coast of Nova Scotia, Prince Edward Island, Newfoundland, Labrador, and Lower Canada, there were no regulations whatever that were worthy to be brought to the attention of the American fishermen, who were about to resume fishing upon all that coast under the provisions of the treaty of 1854. And you come down to a clear case of no regulation which could by any possibility affect the exercise by American fishermen of their liberty under the treaty 1783, evidence affirmatively establishing that, though it was unnecessary to affirmatively establish it, because there has been no evidence produced whatever that any regulation was brought into contact in any way whatever with any American fisherman exercising his liberty.

But we are not left entirely to the absence of regulation. There is affirmative evidence, perfectly clear evidence, that the negotiators did have regulations in mind. What they had in mind was not regulations which were determined upon by Great Britain, or any of its colonies, in the exercise of its sole judgment: but they were regulations established by the concurrence, the accord of the judgment both of Great Britain and the United States regarding the exercise of the common liberty.

I will ask the attention of the Tribunal again to a letter which I have so often referred to, and shall again, the letter from Lord Bathurst to Mr. Adams of the 30th October, 1815, in the United States Case Appendix, p. 278. I begin at the last paragraph on p. 277. Mr. Adams and Lord Bathurst had been arguing out the question, the Tribunal will remember, as to whether the liberty granted in 1783 survived the War of 1812, and had been stating their reasons; and in this letter Lord Bathurst had stated his ground for insisting that the liberty fell with the war. Then he goes on:—

“Although His Majesty’s Government cannot admit that the claim of the American fishermen to fish within British jurisdiction, *and* to use the British territory for purposes connected with their fishery, is analogous to the indulgence which has been granted to enemy’s subjects engaged in fishing on the high seas, for the purpose of conveying fresh fish to market, yet they do feel that the enjoyment of the liberties, formerly used by the inhabitants of the United States, may be very conducive to their national and individual prosperity, though they should be placed under some modifications; and this feeling operates most forcibly in favour of concession. But Great Britain can only offer the concession in a way which shall effectually protect

1247 her own subjects from such obstructions to their lawful enterprises as they too frequently experienced immediately previous to the late war, and which are, from their very nature, calculated to produce collision and disunion between the two states.

"It was not of fair competition that His Majesty's Government had reason to complain, but of the preoccupation of British harbors and creeks, in North America, by the fishing vessels of the United States, and the forcible exclusion of British vessels from places where the fishery might be most advantageously conducted. They had, likewise, reason to complain of the clandestine introduction of prohibited goods into the British colonies by American vessels ostensibly engaged in the fishing trade, to the great injury of the British revenue.

"The undersigned has felt it incumbent on him thus generally to notice these obstructions, in the hope that the attention of the Government of the United States will be directed to the subject; and that they may be induced, amicably and cordially, to co-operate with His Majesty's Government in devising such regulations as shall prevent the recurrence of similar inconveniences.

"His Majesty's Government are willing to enter into negotiations with the Government of the United States for the modified renewal of the liberties in question."

The Tribunal will perceive that Lord Bathurst there, while denying the right of the United States to claim a continuance of the liberties granted in 1783, and notwithstanding the war, was willing to continue those liberties, re-grant them, provided the United States "would co-operate with His Majesty's Government in devising such regulations as shall prevent the recurrence of inconveniences similar to those" which he has recounted. That is joint regulation. That is not bringing to bear upon the exercise of the liberties of the Americans the sole and uncontrolled judgment of Great Britain. It is a distinct proposal, in the letter that formed the basis and corner-stone of the negotiations of 1818, that this renewal should be on the basis of joint regulation.

Mr. Adams, on p. 286 of the United States Case Appendix, in his reply to Lord Bathurst, closes his letter with an acceptance, as full as a minister dealing with a new proposition, without having had time to consult with his Government could well make it, of this proposal for joint regulation. I read the last paragraph on p. 286 of the United States Case Appendix, where Mr. Adams says:—

"The collision of particular interests which heretofore may have produced altercations between the fishermen of the two nations, and the clandestine introduction of prohibited goods by means of American fishing vessels, may be obviated by arrangements duly concerted between the two Governments. That of the United States, he is persuaded, will readily co-operate in any measure to secure those ends compatible with the enjoyment by the people of the United States of the liberties to which they consider their title as unimpaired, inasmuch as it has never been renounced by themselves."



Mr. Adams reported this correspondence to Washington, and thereupon Mr. Monroe, who was then Secretary of State, replied acknowledging the receipt of the correspondence, in a letter dated the 27th February, 1816, which appears on p. 287 of the United States Case Appendix. Mr. Munroe says:—

“It appears by these communications that, although the British Government denies our right of taking, curing and drying fish within their jurisdiction, and on the coast of the British provinces in North America, it is willing to secure to our citizens the liberty stipulated by the treaty of 1783, under such regulations as will secure the benefit to both parties, and will likewise prevent the smuggling of goods into the British provinces by our vessels engaged in the fisheries.”

Then he goes on to say that he encloses a power authorising Mr. Adams to negotiate a convention providing for the objects contemplated.

And on p. 288 of the United States Case Appendix, the very next page, the Tribunal will find a power from Mr. Munroe to Mr. Adams, dated the 27th February, 1816, the same day as the letter which I have just read:—

“Sir: It being represented, by your letter of the 8th of November, that the British Government was disposed to regulate, in concert with the United States, the taking of fish on the coasts, bays, and creeks of all His Britannic Majesty’s dominions in America, and the curing and drying of fish by their citizens on the unsettled bays, harbors, and creeks of Nova Scotia, Magdalen islands, and Labrador, in such manner as to promote the interest of both nations, you will consider this letter an authority and instruction to negotiate a convention for these purposes.”

The negotiation went on with a long period of offer and refusal and new offers, and give-and-take bargaining regarding the extent of territory, until finally it brought up with these negotiators at London making the treaty of 1818, and with these letters in their hands—both parties; and there the British negotiators proposed express joint regulations. In the articles presented by the British negotiators at the fifth conference, appearing at p. 312 of the

United States Case Appendix, the Tribunal will see that they 1248 proposed express joint regulations to govern the protection of rivers—the very subject on which this power of local regulations had been given to the local magistrates, and to which this New Brunswick statute about the River St. John referred, and to which the revised statutes of New Brunswick referred. They do not depend upon any power of Great Britain, or of any British colony to pass laws which shall carry river protection into the bays or harbors to which the Americans may come. They do not rely upon any power of any British legislative body to draw the line between the river and the bay, to draw the line where they may go with their protection of

their exclusive river fishing, or to say that for common benefit the exercise of the American liberty shall be limited and restricted thus and so; but following the proposal that was in Lord Bathurst's letter that formed the basis for the negotiations accepted by Mr. Adams and ratified by the formal action of the American Government, they proceed to propose a joint regulation upon that question. They further propose a joint regulation with regard to smuggling—very stringent in its character.

JUDGE GRAY: I was looking for the joint regulation to which you are referring—the proposal for joint regulation.

SENATOR ROOT: The one to which I have been referring?

JUDGE GRAY: Yes.

SENATOR ROOT: That is on p. 312, in article A, the second paragraph of article A, the article as proposed by the British negotiators.

THE PRESIDENT (reading): "And it is further agreed that nothing contained in this article"—

SIR CHARLES FITZPATRICK: The last part of it: "And it is agreed on the part of the United States that the fishermen of the United States," &c.

THE PRESIDENT: Yes.

"and it is agreed on the part of the fishermen of the United States resorting to the mouth of such rivers, shall not obstruct the navigation thereof."

SIR CHARLES FITZPATRICK (reading):

"Nor wilfully injure nor destroy the fish within the same," &c.

THE PRESIDENT: Is that a joint regulation?

JUDGE GRAY: Yes; in the treaty itself.

SENATOR ROOT: Yes.

JUDGE GRAY: It is a provision in the treaty itself for a regulation.

SENATOR ROOT: Yes; it is putting a regulation into the treaty.

SIR CHARLES FITZPATRICK: It is putting an obligation on the United States to impose certain restrictions on its citizens. That is what it is.

SENATOR ROOT: Putting an obligation on the United States to impose certain restrictions?

SIR CHARLES FITZPATRICK: Yes; putting an obligation on its own citizens. That is what it is.

SENATOR ROOT: Yes; I quite agree to that proposition.

JUDGE GRAY: That is a regulation.

SIR CHARLES FITZPATRICK: Yes.

SENATOR ROOT: Then in the last paragraph of this article A, on p. 313 of the United States Case Appendix, is another regulation:—

"And in order the more effectually to guard against smuggling, it shall not be lawful for the vessels of the United States engaged in the



said fishery to have on board any goods, wares, or merchandise whatever, except such as may be necessary for the prosecution of the fishery, or the support of the fishermen whilst engaged therein or in the prosecution of their voyages to and from the said fishing grounds. And any vessel of the United States which shall contravene this regulation may be seized, condemned, and confiscated, together with her cargo."

That is putting the enforcement directly into the hands, I suppose, of the—

1249 SIR CHARLES FITZPATRICK: That is a customs regulation.

SENATOR ROOT: Yes.

SIR CHARLES FITZPATRICK: That is a customs regulation, not a fishery regulation.

JUDGE GRAY: It regulates fishing-vessels.

SENATOR ROOT: It regulates fishing-vessels and subjects fishing-vessels to the supervision and judgment of local officers; for of course somebody has to determine whether the "goods, wares, or merchandise on board of the fishing-vessel" are necessary for the transaction of their fishery or the support of the fishermen. Somebody has to say that; and this regulation, I apprehend, was objected to because it put the decision of that question in the hands of the local officer, who, if he did not feel very kindly toward foreigners that were coming there to take his neighbours' fish away, would be apt to find that they had things on board which they did not need, just as in Canada there was for a time applied the rule that a vessel under the renunciatory clause could not go to the non-treaty coast for shelter, wood, and water, unless she was actually in distress, and unless she brought wood and water with her sufficient for her voyage, and had been unexpectedly deprived of her store; that is to say, they held that a vessel could not come up to the coast with an insufficient supply of wood or water and rely upon getting it there. It had got to be a case of real distress, arising without premeditation in order to justify it. Of course that did not last for many years. I think that was disposed of by the opinion of the law officers of the Crown of 1839.

These two were rejected by the United States, and the ground of the objection is stated at p. 314 of the United States Case Appendix, in a formal memorandum given by the United States Commissioners to the British Commissioners. I read from the second paragraph on p. 314. The American Commissioners say, regarding these proposals:—

"The liberty of taking fish within rivers is not asked. A positive clause to except them is unnecessary, unless it be intended to comprehend under that name waters which might otherwise be considered as bays or creeks. Whatever extent of fishing ground may be secured to American fishermen, the American plenipotentiaries are not prepared to accept it on a tenure or on conditions different from those on which

the whole has heretofore been held. Their instructions did not anticipate that any new terms or restrictions would be annexed, as none were suggested in the proposals made by Mr. Bagot to the American Government. The clauses forbidding the spreading of nets, and making vessels liable to confiscation in case any articles not wanted for carrying on the fishery should be found on board, are of that description, and would expose the fishermen to endless vexations."

And that was assented to by the British Commissioners upon the ground not that there was a right of legislation to cover these points, but upon the ground that it was not important. The letter from the British negotiators, or from Mr. Robinson for the British negotiators, of the 10th October, 1818, appears in the British Case Appendix at p. 92. Mr. Robinson writes Viscount Castlereagh, and says:—

"I then proceeded to state to them that upon the fishery article, we were not disposed to insist upon the exclusion of those points, the introduction of which they had at our last conference represented to be a *sine quâ non*; and after some discussion it was also agreed on our part not to insist upon the two provisions contained in our proposed article respecting the fishing in rivers and smuggling, to which they felt very considerable objections, and which did not appear to me to be of such importance as to require to be urged in a way that might prevent an arrangement upon the fisheries taking place."

Now, the reason why these provisions were unimportant, the reason why, instead of going to work to redraft them, and put them in such shape that they would be unobjectionable as joint regulations, appears in the correspondence which had taken place during this period of bargaining as to the extent of the new grant. Remember that Lord Bathurst's language, in his letter which I first quoted upon this subject, appeared to contemplate a renewal of the entire liberty of 1783. It appeared to, although not binding him specifically, and it was evidently so understood by Mr. Adams and by Mr. Monroe. But when they came to get down to details, the British negotiators cut down the grant, and if they ever did have such generous intention, as would appear to have been contemplated by Lord Bathurst, they abandoned it; for the first step in that process of bargaining that I have referred to, intermediate the arrangement for joint regulation and the actual making of the treaty, was by Mr. Bagot, in Washington, to Mr. Monroe, on the 27th November, 1816 (in the United States Case Appendix, p. 289).

He begins the bartering by an offer of the coast of Labrador alone, and he begins by saying to Mr. Monroe:—

1250 "In the conversation which I had with you a few days ago, upon the subject of the negotiation into which the British Government is willing to enter, for the purpose of affording to the citizens of the United States such accommodation for their fishery, within the British jurisdiction, as may be *consistent with the proper*



*administration* of His Majesty's dominions, you appeared to apprehend that neither of the propositions which I had had the honor to make to you upon this subject would be considered as affording in a sufficient degree the advantages which were deemed requisite."

I ask you to observe that phrase—

"such accommodation . . . . as may be consistent with the proper administration of His Majesty's dominions."

And you will see, as we go on with this correspondence, that what dwelt in the minds of the British negotiators was that it was not consistent with proper administration and control on the part of His Majesty's Government to have the United States granted access to these coasts. It was an interference with due administration; and so they proposed to shove them off to the coast of Labrador, where there was not anybody but cod-fish and whales and icebergs—or this little strip of the south coast of Newfoundland.

Over on the next page, 290, Mr. Bagot goes on to say:—

"It is not necessary for me to advert to the discussion which has taken place between Earl Bathurst and Mr. Adams. In the correspondence which has passed between them, you will have already seen, in the notes of the former, a full exposition of the grounds upon which the liberty of drying and fishing within the British limits, as granted to the citizens of the United States by the treaty of 1783, was considered to have ceased with the war, and not to have been revived by the late treaty of peace.

"You will also have seen therein detailed the serious considerations affecting not only the prosperity of the British fishery, but the general interests of the British dominions, in matters of revenue as well as government, which made it incumbent upon His Majesty's Government to oppose the renewal of so extensive and injurious a concession, within the British sovereignty, to a foreign state, founded upon no principle of reciprocity or adequate compensation whatever."

Then, towards the foot of that page, he refers to his offer of the coast of Labrador; and then he refers to an alternative offer that he had made of the south coast of Newfoundland from Cape Ray to Ramea Islands—this same one which is now included in the treaty, as an alternative to the Labrador coast—either one or the other. And he goes on to say in the last paragraph of this letter:—

"The advantages of this portion of coast are accurately known to the British Government; and, in consenting to assign it to the uses of the American fishermen, it was certainly conceived that an accommodation was afforded as ample as it was possible to concede, *without abandoning that control within the entire of His Majesty's own harbors and coasts which the essential interests of His Majesty's dominions required.*"

You will see there carried on the idea that the admission of Americans was an interference with administration and an abandonment

of control. For that reason they wanted to shove them off to these unfrequented and practically unsettled coasts.

Mr. Monroe declined each of these offers, and Mr. Bagot came back with a letter on the 31st December, 1816, in which he offered both of these stretches which he had formerly offered in the alternative. The letter is on p. 292 of the United States Case Appendix, and in it he says:—

“The object of His Majesty’s Government, in framing these propositions, was to endeavor to assign to the American fishermen, in the prosecution of their employment, as large a participation of the conveniences afforded by the neighboring coasts of His Majesty’s settlements as might be reconcileable with the just rights and interests of His Majesty’s own subjects, and the due administration of His Majesty’s dominions;”

Mr. Monroe declined that proposition, and when the negotiators came together (the negotiations having been kept open by expressions of good intentions of both parties) the American negotiators presented a third proposition, which is the one now in the treaty, which took in both the Labrador coast and the south coast of Newfoundland, that had been offered, first, alternatively, and, second, collectively; and also the west coast of Newfoundland. They presented that on the 17th September, 1818, and on that same day Messrs. Robinson and Goulburn, the British negotiators, reported to their government the reasons given by the Americans for the action which they took; and that appears at p. 86 of the British Case Appendix. I shall be very glad to have your Honour’s attention to that letter. This is the letter not dated, except September, but which I have already observed, is located as of the 17th by reference to the 1251 protocols of that day. Reading about one-third down, the third paragraph on p. 86, the writers say:—

“With respect to the fisheries they observed”——

That is, the American Commissioners observed.

“that in consideration of the different opinions known to be entertained by the Governments of the two countries, as to the right of the United States to a participation in the fisheries within the British jurisdiction, and to the use for those purposes of British territory, they had been induced to forego a statement of their views of this right in the article which they had proposed; but they desired to be understood, as in no degree abandoning the ground upon which the right to the fishery had been claimed by the Government of the United States, and only waiving discussion of it, upon the principle that, that right was not to be limited in any way, which should exclude the United States from a fair participation in the advantages of the fishery: They added that while they could not but regard the propositions made to the Government of the United States by Mr. Bagot as altogether inadmissible, inasmuch as they restricted the American fishing to a line of coast so limited, as to exclude them



from this fair participation, they had nevertheless been anxious in securing to themselves, an adequate extent of coast, to guard against the inconveniences which they understood to constitute the leading objection, to the unlimited exercise of their fishing. With this view they had contented themselves with requiring a further extent of coast, in those very quarters which Great Britain had pointed out, because it appeared to them that the very small population established in that quarter, and the unfitness of the soil for cultivation rendered it improbable that any conduct of the American fishermen in that quarter could either give rise to disputes with the inhabitants, or to injuries to the revenue."

So you will see that the proposal for joint regulation, made and accepted, under which these joint regulations were proposed to be put into the treaty, was laid aside in favour of a plan which involved pushing the United States right off on to a wild and uninhabited coast, where it was not necessary to have any regulations; where there could not be any collisions, for there was nobody to collide with; where there could not be any smuggling, for there was nobody there to smuggle to, as indeed all these coasts were in the year 1818; and where, the soil being unfit for cultivation, there was no probability that in the future there would be any such population as to make it necessary for the negotiators at that time, in 1818, to bother their heads about joint regulations.

THE ATTORNEY-GENERAL: May I detain the Tribunal for one moment? I should like to draw attention to one point raised by Mr. Root. I think I should do it at once, instead of waiting until the end of his speech and then asking permission to lay it before the Tribunal.

Mr. Root thought I had been mistaken in saying that the opinion expressed by the law officers of Newfoundland in 1854, I think, as to the absence of local regulation at that time was a correct opinion; and he pointed out that the earlier legislation of Newfoundland had already been consolidated and repealed, re-enacted as to part, in a statute of 1824, which was a five-year statute, continued until 1829, continued again until 1832, and then dropped.

Now, Mr. Root argued that—

SIR CHARLES FITZPATRICK: It was continued until 1834, and then dropped.

THE ATTORNEY-GENERAL: Continued until 1834 and then dropped; Yes.

Mr. Root argued that the repeal was permanent, although the statute itself was temporary; and that, therefore, when the statute expired there was no regulation. It is a matter of English law, which the Tribunal will find in "Maxwell on Statutes," under the heading of "Repeals," that if a statute repealed an antecedent statute at that stage in our history—it is not so now—and the repealing statute itself

determined or was repealed, all the statutes that it had repealed revived. So that when the statute of 1824 expired, all the repealed statutes therein contained revived. Otherwise Newfoundland would have been left without regulation at all.

SIR CHARLES FITZPATRICK: Without legislation at all—without anything?

THE ATTORNEY-GENERAL: Without legislation, yes. But, in fact, of course, all these statutes continued, and the law officers of Newfoundland were all right when they said there were no local regulations; because there had been no local regulations since 1834. But the whole of the antecedent imperial legislation continued and was in full force.

I hope Mr. Root will forgive me for making this statement at this time. I did not wish to interrupt him while he was speaking.  
1252 and I thought I had better mention it now, so that if he wishes to deal with it at a later period in his argument, he will have an opportunity to do so.

[Thereupon, at 12.15 o'clock p. m., the Tribunal took a recess until 2.15 o'clock p. m.]

AFTERNOON SESSION, MONDAY, AUGUST 8, 1910, 2.15 P. M.

THE PRESIDENT: Will you please to continue, Mr. Senator Root?

SENATOR ROOT: Regarding the subject of which the Attorney-General spoke just at the time of adjournment, my remarks were addressed solely to the question of the continuance of the statute of 1824, and the question as to whether the expiration of that statute in the year 1834 resulted in reviving the statutes which it had repealed, was one that I did not address myself to, and it does not seem to be a matter of any particular consequence upon the issues in this case, because those statutes contained no regulation of fisheries in Newfoundland. The situation as it existed when the Act of 1824 was passed was that there were no regulations in respect of the time and manner of taking fish in Newfoundland.

It may be an interesting question, although not material to this controversy, as to whether the limitation of the statute applies to the repeal; the statute of 1824 is an Act to repeal several laws relating to the fisheries carried on upon the banks and shores of Newfoundland, and to make provision for the better conduct of the said fisheries for five years. That is the title. It recites:—

“Whereas it is expedient to repeal and amend divers statutes and laws relating to the fisheries,”

And so on.

Now, whether the limitation of time would operate as a limitation upon that apparently executed provision of the statute so as



to revive the others, may be an interesting question, but as I say, not especially material to this controversy.

It is evident that in Newfoundland they did not consider that anything had been revived, for the letter of the Governor of Newfoundland to the Colonial Office, which appears on p. 250 of the United States Counter-Case Appendix under date the 29th September, 1855, says:—

“I have the honour to transmit herewith a copy of the Report from the Law Officers of the Crown, which has been furnished in fulfilment of the instructions conveyed by your despatch of the 3d ulto., No. 6, and which I shall take care to communicate to the British Minister at Washington, with whom I have already been in correspondence on the subject to which it relates.

“2. You will perceive by this Report, which is entirely accordant with that of the late Attorney-General, Mr. Archibald, dated July 5th, 1853, copy of which was transmitted with my predecessor's despatch, No. 46, July 12th, 1853, that there are in fact no Laws or regulations whatever relating to the Fisheries practically in force in this Colony.

THE PRESIDENT: The Attorney-General in the enclosed letter says:—

“apart from the common law of England, which is in operation here” . . . . . “there are no special enactments of the Local Legislature in operation here for the regulation of the fisheries.”

SIR CHARLES FITZPATRICK: What would be the common law of England under these circumstances?

SENATOR ROOT: I should not like to answer that question.

SIR CHARLES FITZPATRICK: Would the statutes in force at the time in England, applicable to Newfoundland, be part of the common law of England at that time?

SENATOR ROOT: I do not know what he meant, but it is evident what the Governor thought he meant.

THE PRESIDENT: And what would be the consequence of the repealing, by the Act of 1824, of the part of statute of 1775, by which it was enacted that fishermen on the Newfoundland banks, or, perhaps, on the Newfoundland shores, are not liable to restraint concerning the hours and days of working?

SENATOR ROOT: I do not suppose that would impose a restraint.

1253 THE PRESIDENT: Would it impose a restraint, because the repealing act had been repealed? That is a very complicated question.

SENATOR ROOT: It is evident it was not considered there was any practical restriction, and that is all we really have to do with.

If the expiration of the act of 1824 wiped out the repeal, it reinstated that provision, and there were no restrictions to be reinstated.

Now I wish to ask your attention to the express provisions regarding restriction which the negotiators did put into the treaty of 1818.

When they came to deal with the rights granted by the first article of the treaty, there were three. There was the fishing right, there was the drying and curing right on shore, and there was the right to enter the bays and harbours of that part of the coast to which the renunciation applied, for shelter, repairs, wood and water; and upon that one of the three rights granted relating to the shore, they imposed an express restriction. That "so soon as the same (that is bays, harbours, and creeks on the southern part of the coast) or any portion thereof, shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such portion so settled without previous agreement for such purpose with the inhabitants, proprietors, or possessors of the ground." And they did that in face of the fact that in the letter of Mr. Adams, which is a part of the correspondence forming the basis of the negotiation and in the hands of the negotiators for both countries, there had been a discussion of that restriction as it stood in the treaty of 1783, and a declaration by Mr. Adams that the inclusion of that express restriction under the doctrine *expressio unius est exclusio alterius* was an exclusion of any implied restriction.

On p. 283 of the United States Case Appendix, in Mr. Adams's letter of the 22nd January, 1816, to Lord Castlereagh, at the foot of the page, is the observation to which I have referred. Mr. Adams says:—

"Among them" (that is among the benefits coming to the inhabitants of the United States), "was the liberty of drying and curing fish on the shores, then uninhabited, adjoining certain bays, harbors, and creeks. But, when those shores should become settled, and thereby become private and individual property, it was obvious that the liberty of drying and curing fish upon them must be conciliated with the proprietary rights of the owners of the soil. The same restriction would apply to British fishermen; and it was precisely because no grant of a new right was intended, but merely the continuance of what had been previously enjoyed, that the restriction must have been assented to on the part of the United States. But, upon the common and equitable rule of construction for treaties, the expression of one restriction implies the exclusion of all others not expressed; and thus the very limitation which looks forward to the time when the unsettled deserts should become inhabited, to modify the enjoyment of the same liberty conformably to the change of circumstances, corroborates the conclusion that the whole purport of the compact was permanent and not temporary—not experimental, but definitive."

Now, I say, in that letter, which was one of the series of letters forming the basis of this negotiation and in the hands of the negotiators upon both sides, there was the argument with respect to the



expression of that restriction, that it excluded any possible implication of other restrictions, however circumstances might change, and, in the face of that, the negotiators included in their treaty that express restriction without any saving as against the application of the doctrine *expressio unius*.

THE PRESIDENT: Could it not be said, Mr. Root, that for this reservation there was quite a special reason and a special necessity in the words "for ever," because if this reservation had not been made, then the use of the shore for drying purposes would also be a permanent use without any regard to its becoming inhabited on the shores?

SENATOR ROOT: Yes, Mr. President, that may be said. That furnishes a reason for putting in the express restriction, but emphasises the interference inevitably to be drawn from the fact that in the face of the argument which Mr. Adams had used as to the well-known implication that from the expression of one restriction, the absence of power to impose any others has to be drawn. In the face of that they did put it in. However good the reason may have been, doubtless there was a reason, evidently there was a reason, but the fact that there was a reason does not interfere at all with the inference we are bound to draw from the fact that with fair notice that that rule would be applied to them, was being applied to them, they chose to put it in without any saving clause to negative the application of the rule.

THE PRESIDENT: This reservation was to express that the right to fish was a permanent right, and that the right to dry and cure was not a permanent right, but depended upon the circumstance whether the shore remained unsettled, as at that time it was, or became afterwards settled.

1254 SENATOR ROOT: Precisely. There was a good reason for putting it in, and there was not, manifestly, in the minds of the negotiators, any occasion for negating the inference that would be drawn from the fact that they did put one restriction in.

Then they proceed in dealing with the third branch of the treaty right, that which relates to the entrance of the American fishermen into bays or harbours on what we call the non-treaty coast, although one of my friends on the other side has justly remarked it was all treaty coast, for the purpose of shelter and repairing damage, purchasing wood and obtaining water, to impose there an express reservation of the power of restriction—

"They shall be under such restriction as may be necessary to prevent their taking, drying or curing fish therein or in any other manner whatever abusing the privileges hereby reserved to them."

That is an express reservation of the power of future restriction by regulation limited to the specific purposes that are designated here.

So these negotiators did not merely refrain from imposing upon the grant of right to have the inhabitants of the United States enter this territory, and exercise the liberty of taking fish, those restrictions which they themselves put upon the ordinary rights of trade and travel and residence in the treaty which they reproduced in the fourth article of this convention of 1818—they did not merely refrain from attaching to this grant the reservation of the right of municipal legislation which they attached to that grant, but as to the two of the three branches of the rights they granted, they dealt with the subject of restriction. As to one they included an express restriction; as to the other they included an express reservation of the power of future restriction, limited to a specific purpose.

Now, what must be the inference? Why is it? I put the question with great earnestness to your Honours. Why is it that these negotiators treated the two different kinds of rights, the kind of right which was described in the treaty of 1815 that they reproduce in article 4, and the kind of right which was the subject of this specific grant so differently?

Let me answer first, narrowly, out of the mouths of the men who were concerned in the transaction, and then I will answer broadly according to my general view of the underlying basis of the different treatment.

First, the narrow answer, from the report of Mr. Gallatin, British Case Appendix, p. 97. He is reporting to Mr. Adams, his Secretary of State at home, the reason why Great Britain was unwilling to continue the broad grant of 1783, and insisting upon the narrow limitations which were finally imposed upon the extent to which the renewal of the grant should apply. And he says, just below the middle of p. 97:—

“That right of taking and drying fish in harbours within the exclusive jurisdiction of Great Britain, particularly on coasts now inhabited, was extremely obnoxious to her, and was considered as what the French civilians call a servitude.”

It is appropriate to consider here what it was that the French civilians called a “servitude,” and I refer you to Code Civile of France of 1804, that had been in force for fourteen years before the making of the treaty of 1818. That code, in article 637, says:—

“A servitude is a burden imposed upon an estate for the use and utility of an estate belonging to another owner.”

Article 686:—

“It is permitted to owners to establish on their property or in favour of their property such servitudes as appear to them proper, provided, nevertheless, that the use established shall not be imposed either upon a person nor in favor of a person, but only upon an



estate, and for an estate, and provided that these burdens shall moreover contain nothing contrary to public order. The use and extent of the servitudes thus established are regulated by the grant which constitutes them. In default of such provision by the following rules."

And, among those rules, article 697:—

"He to whom a servitude is granted has the right of doing everything necessary to make use of it and preserve it."

Article 701:—

"The owner of the servient domain can do nothing which tends to diminish the use of it or render its use more inconvenient."

1255 Now that is what we may reasonably assume was what the French civilians called a servitude. And, that according to the report of Mr. Gallatin is what the British negotiators considered this right to be, and because they considered it to be that, it was obnoxious, and they were unwilling to continue it upon coasts, especially upon coasts that were inhabited. That is the meaning of these letters from Mr. Bagot, in which he explains that Great Britain is unwilling to give a wider extent of fishing rights, to give an extent of fishing right anywhere but upon these wild and unfrequented coasts, because it would interfere with the due administration of His Majesty's Government, and the control which His Majesty exercised over his own territory.

This report is produced and printed by Great Britain. It is a statement by Mr. Gallatin, whose eminence, whose penetrating intelligence, and whose historical position make it impossible to doubt for a moment the genuineness and the veracity of the statement. And, by what is it met?

Where are the reports of the negotiators of Great Britain which might meet it, which might explain it? I do not complain of their absence. Great Britain is not obliged to produce any papers. She produces what she pleases, and she is under no obligation to furnish evidence unless it helps her case; but, I should be unwilling to have this case close, and leave the counsel of the United States open to the imputation hereafter if these reports should ever appear, should ever become public, and they should appear to have matter in them relevant and important to the determination of this case, that counsel of the United States had overlooked the fact that there were probably such reports, and that they had not been produced, or that we had neglected to say to the Court that we must insist upon having the inferences drawn which are natural to be drawn when evidence within the control of a party which might lead to one result or another is not produced.

It appears with great circumstantiality that there must have been reports, for on the 17th September, 1818, we have printed in the

British Case Appendix a formal report by the British negotiators to Lord Castlereagh at the head of the Foreign Office (p. 86, British Case Appendix) :—

“My Lord,

“We have the honour to report to your Lordship, that we had yesterday agreeably to appointment, a further conference with the commissioners of the United States.”

And then it proceeds to give in great detail what happened at the conference. And, on the 10th October there was a letter from Mr. Robinson, one of the negotiators, to Viscount Castlereagh, which appears on p. 92 of the British Case Appendix, an extract, in which he states what had happened in the Conference of the 6th October, and a postscript at the foot in which he says:—

“Although from Mr. Goulburn’s absence I am not yet enabled to send to your Lordship a detailed account of what passed at our preceding conference (the fifth) on the 6th of October, I think it right to enclose for your information, copies of four articles which we then produced as *contreprojets* to articles upon similar points, previously submitted by the American plenipotentiaries.”

After the 6th October, to which this informal letter of Mr. Robinson applies, there is a blank.

Of course the British Plenipotentiaries went on with their reports. Whatever light their reports would have thrown upon these negotiations, whatever light they would have thrown upon the way the words “in common” came in, the reasons why they came in, whatever light they would have thrown upon the views of the negotiators as to the character of the right that was being granted, and the reasons why there were reservations as to trading privileges, imported from former treaties, and a special reservation of the right of restriction regarding the entry of ships on the non-treaty coast, and no mention of any reservation as to the right of fishing, we cannot tell, but we are entitled to draw the inference that those reports contain nothing which in the slightest degree would shake or mitigate or detract from the statement of Mr. Gallatin in the report that he made.

So the British negotiators naturally refrained from providing that the grant of the fishing right should be subject to the authority of Great Britain to limit or restrict it by municipal legislation, because that would have been inconsistent with the nature of the right as they understood it.

Another answer from the British negotiators—that is, from their superior officer—is the letter of Lord Bathurst, which I have already referred to as the corner-stone of this negotiation. I call the attention of the Tribunal to a paragraph of that letter to which I have already referred for another purpose, p. 274 of the Appendix to the Case of the United States. In this letter Lord Bathurst states



1256 the position which Great Britain took and upon which she stood before the world to justify herself for refusing to America the further exercise of the rights granted by the treaty of 1783. It is essential to his purpose that in arguing, in stating, and in maintaining that position upon that all-important subject, he should state the nature of the right, for the question whether it survived or perished with the war depended upon what the nature of the right was, and in this paragraph that I will now read he states that. I have read it once before for another purpose, but I beg you to bear with me if I read it again in order that I may bring to your minds the effect of it upon the argument which I am now endeavouring to make. He says:—

“The Minister of the United States appears, by his letter, to be well aware that Great Britain has always considered the liberty formerly enjoyed by the United States of fishing within British limits, and using British territory, as derived from the third article of the treaty of 1783, and from that alone,”——

Upon that his whole argument rested. He proceeds—

“and that the claim of an independent state to occupy and use *at its discretion* any portion of the territory of another, without compensation or corresponding indulgence, cannot rest on any other foundation than conventional stipulation.”

There is the authentic and unimpeachable declaration of the Government of Great Britain as to the character of the right that they conceived themselves to have granted to the United States under the treaty of 1783, and that they authorised these negotiators to regrant in the treaty of 1818. It was the right of an independent State to occupy and use *at its discretion* a portion of the territory of Great Britain. Of course, they would not for a moment think of imposing upon such a right a reservation of the right of municipal legislation. That is why Lord Bathurst, in this very letter complaining of the difficulties that had arisen in the exercise of the right under the treaty of 1783, proposed not to pass laws to remedy the injury, but proposed joint regulations with the United States to remedy it. It is because the United States so understood it that they accepted his proposition, and power was sent to the American Minister in London to negotiate for joint regulations.

SIR CHARLES FITZPATRICK: May I ask you whether or not the claim of an independent State, which you have just referred to, has reference to the first paragraph of the same letter on p. 273?

SENATOR ROOT: Undoubtedly.

SIR CHARLES FITZPATRICK: He is answering the grounds advanced in the letter of the United States Minister. Let me carry you back further, to p. 272, and ask you whether or not you think that the

claim spoken of by Lord Bathurst is that set forth by Mr. John Quincy Adams in these words:—

“Upon this foundation, my lord, the Government of the United States consider the people thereof as fully entitled, of right to all the liberties in the North American fisheries which have always belonged to them; which in the treaty of 1783, were, by Great Britain, recognised as belonging to them; and which they never have, by any act of theirs, consented to renounce.”

Would that be the claim that he speaks of?

SENATOR ROOT: Very likely. What he says of it is not that that is not what the United States has, but that that right can rest only upon a conventional stipulation. He accepts the view of the right, he denies the origin of the right, and he ascribes to the right, which he describes in these words, an origin which is the basis of his argument.

JUDGE GRAY: It was conventional.

SENATOR ROOT: It was conventional. Now, a view not so narrow as these specific utterances, but which does furnish the reason for them; there is an inherent, essential ineradicable, generic difference between the two kinds of right, the kind of right which was granted in the treaty of 1815, that treaty which was continued by the treaty of 1818, and which, I may observe, was again continued in 1827, and is the treaty under which we live to-day, to travel and reside, and upon which these British negotiators had imposed the express reservation of the right of municipal legislation, and the kind of right which was granted under this treaty with respect to fishery. I have to acknowledge hospitality and courtesy from the people of Newfoundland, because I have been there, and, with them, have shot 1257 caribou in their wilderness, and killed salmon in their streams, accompanied by Newfoundlanders. We were exercising privileges in common and with no limitation upon one that was not upon the other. We could fish together, buy and sell, borrow and lend, give and take without restriction; we could have fished from the same boat, could have drawn the seine upon the same strand, we could have employed one or another in each other's service. I was mingling with the people of Newfoundland as an individual because I was going there under the privilege of a general right of intercourse which obtains among all civilised nations, declared and expressed in the treaty of 1815 and in this treaty of 1818.

But how different would have been the situation had I gone as an American fisherman upon an American ship! Then I would have been a member of a class set apart by itself, not sharing in any of the common opportunities, or advantages, or privileges, of the people of Newfoundland. If I had fished from the same boat as a New-



foundlander he would have been arrested, tried and convicted. If we drew a seine together upon the same strand, punishment would follow to him, or confiscation to my vessel. If I say that I want bait or the implements of fishing, I can not obtain them but at the risk of criminality on his part.

One right is a right in which the individual mingles with the community subject to the same laws and entitled to the same opportunities. There are millions of people, natives of one country, who are living so in peace in the other countries of the earth to-day; but under the other right there is a special class set part with none of these opportunities, to be held down narrowly and rigidly to the precise right that is found within the four corners of the treaty. Laws and regulations which are bound to operate equally upon individuals are bound, in the working of human nature, to operate unequally when established by one class as against another class. There is a radical and perpetual distinction between the two, and for months here counsel for Great Britain have been seeking to drive into your minds an impression which would lead you to read into the treaty of 1818 as to the fishing grant, considerations appropriate only to the exercise of the other kind of right which can be enjoyed by individuals and not by a class bound closely to the specific rights of a treaty.

These two kinds of right demand and receive entirely different treatment. The principles applicable to one are inapplicable to the other as a matter of justice, equity, convenience, the reason of the thing, which is Mansfield's definition of international law. The counsel for Great Britain have been urging upon you that you shall read into this provision the reservation of the right in Great Britain to treat this grant as if it were a general grant to be enjoyed by individuals in common with the natives of the country, while they treat their laws upon the other and irreconcilable theory. They treat their laws as laws not bound in any respect to give to the persons enjoying the privilege of this fishery grant an opportunity as if they were, in fact, exercising the privileges in common with the people of Newfoundland. They wish to read their right into the treaty and to preserve their right against their own theory of the treaty. The treaty must be read either in one way or the other. If the treaty is a treaty to be considered as subject to those rights of municipal legislation that arise from the intermingling of individuals and foreigners in common opportunity, common privilege, and the common exercise of a common right, then their laws should give that to us. If, on the other hand, this treaty is to be read as a treaty in the exercise of which we, as a class, coming from a foreign shore, under a foreign flag, fishing in competition with the people of Newfoundland, are to be rigidly restrained to the letter of our treaty grant, they must not read into the treaty right that it imposes upon

us regulations which are appropriate, natural, and reasonable to the exercise of the other kind of right.

That is what Lord Bathurst had in his mind; that is what the negotiators, as reported by Mr. Gallatin, had in their minds; that is why they imposed an express reservation of the right of regulation upon the treaty grant of 1815, and why, when they came to deal with this fishery right, they imposed no such reservation; and why, as to one of the three rights, they made an express regulation; as to another they expressed a limited right of restriction, and as to the third they were silent.

I call your Honours' attention to the fact that the propositions which I am now making depend not at all upon the essential character which I argued the other day of this grant. They are as applicable, as effective, as peremptory and imperative, if this be a contract—a mere obligatory contract—as they are if this be a conveyance of a real right, for the limitation of the contract obligation rests upon Great Britain so long as the contract remains. It may not survive war as an obligation, it may not survive a change of sovereignty as an obligation, but so long as it subsists, so long as it limits either the power or the exercise of the power of Great Britain, so long will this Tribunal see it as being the law and the guide to its Award.

1258 THE PRESIDENT: Concerning the proviso at the foot of article 1, I should like to ask a question: To whom does the restriction apply that they are not allowed to enter except for these four purposes? It says, "provided, however, that the American fishermen shall be admitted to enter such bays," &c. Does this restriction apply only to American fishermen, or does it apply to British subjects? It is limited to American fishermen?

SENATOR ROOT: Yes.

THE PRESIDENT: Do the regulations which Great Britain claims to have the right to make concerning the exercise of the fishery apply to American and British fishermen?

SENATOR ROOT: They may and they may not, so long as they are two separate classes. One class is what Mr. Evarts calls the strand fishermen, and the other class is what he calls the vessel fishermen. They are precluded from mingling, they cannot fish on the same boat and cannot deal with each other in the ordinary intercourse of life. The vessel fishermen cannot use the strand for any of the numerous purposes for which it is desirable so long as they do constitute a separate and distinct class. One prosecuting this industry under its common right in one way and under one set of conditions, and the other prosecuting its industry under its common right under another set of conditions, it is impossible that regulations imposed upon one set of fishermen, should be reasonable and adequate, when they are



applicable to the other. The claim of Great Britain necessarily is that, she being representative of one distinct class, is entitled to restrict and modify by her sole will, which she intends to exercise reasonably, but by her sole will, with all the prepossessions and prejudices of one class, the exercise of the right of the other class. I say it is an entirely different situation, governed by different principles, from the situation created where individuals go in and commingle as they are doing all over the world with all the privileges and all the opportunities of the people of the country into which they go. That distinction is clearly pointed out and put beyond reasonable question by these very statements of the men of the time who made this treaty.

JUDGE GRAY: Does not the proviso necessarily refer to American fishermen?

SENATOR ROOT: Necessarily so.

JUDGE GRAY: It is that they are permitted to enter for the four purposes?

SENATOR ROOT: Yes, precisely. They constitute a separate class by themselves, differing from the other class. We have other questions which really touch upon the same line as to whether for example, the customs law regarding entry, manifests and all the cumbersome machinery of a customs tariff and its enforcement with reference to the vessels of the Canadians, is applicable to this different and distinct class which comes in to exercise a special right as a special and separate class under this treaty.

THE PRESIDENT: This proviso is a discriminating provision, for if it has any reason for existence it must have been put in the treaty as being a discriminating provision.

SENATOR ROOT: Well, still you have the inference from the fact that it is put in, and as I have intended to make clear, the fact of the distinction between the situations of the two competing classes makes it impossible that provisions properly governing them should not be discriminating, just as many of these statutes that I have been referring to, in words apparently covering everybody, operate to produce a distinct discrimination against the foreign class that comes in.

THE PRESIDENT: Under different circumstances; they are working in different ways?

SENATOR ROOT: Precisely, so that the idea of non-discrimination is an illusion, it is a form, it is not a reality in any sense whatever. As opposed to all this evidence, there is not one word coming from these negotiators during the entire course of this negotiation to show that any one having anything to do with the negotiation for a moment conceived the idea that there was reason to imply a right of municipal legislation to limit and restrict the exercise of this treaty right.

I now pass to the construction placed upon this treaty by the parties when the treaty has been made. I shall, I think, show that for sixty years after the making of the treaty both Governments treated it in accordance with the view which I have imputed to the negotiators of the treaty. The first thing done under the treaty was 1259 the passing of the Act of 1819, which appears in the United States Case Appendix at p. 112. I need not dwell very long upon that, further than to say what, I think, has already been said that the Act neither provides for nor contemplates any regulation of the right of fishing. It does expressly provide that His Majesty, with the advice of the Privy Council, may—

“Make such Regulations, and to give such Directions, Orders and Instructions to the Governor of Newfoundland, or to any Officer or Officers on that Station, or to any other person or persons whomsoever, as shall or may be from time to time deemed proper and necessary for the carrying into Effect the Purposes of the said Convention.”

Of course the other person or persons are persons to whom it is competent for the King in Council to give orders, persons whose position would enable them to exercise an influence on giving effect to the treaty provisions. On the other hand, the Act vests in His Majesty in Council and in the Governor or person exercising the office of Governor, in such parts of His Majesty's dominions in America as are covered by the renunciatory clause, the power to make regulations under that clause.

The first step taken by the British Government after the treaty is a step which does not contemplate regulating the American exercise of the American right of fishing, but does contemplate giving effect to that right and regulating the right of vessels on the non-treaty coasts. The next step was the Order-in-Council of the 19th June, 1819, which appears at p. 114 of the United States Case Appendix.

THE PRESIDENT: May I ask your comment, Mr. Senator Root, concerning a disposition in No. 4 of the Act, where it is said, about the middle of the article—

“if any Person or Persons shall refuse nor neglect to conform to any Regulations or Directions which shall be made or given by the Execution of any of the Purposes of this Act, every such Person, so refusing or otherwise offending against this Act shall forfeit the Sum of Two hundred Pounds.”

Does that refer to the non-treaty coast only, or does it refer also to the treaty coast? And what are the regulations which are meant in this part of the Act?

SENATOR ROOT: I understand it to be, although this is rather a first impression on the President's question, a reference to the “directions, orders and instructions to the Governor of Newfoundland, or to any officer or officers on that station, or to any other person or persons



whomsoever," and a refusal or neglect "to conform to any regulations or directions which shall be made or given for the execution of any of the purposes of this Act," although it may include both. It would require more careful examination and consideration than I have given to the question for me to determine in my own mind. But the Act seems to contemplate two quite different proceedings. One is the—

"giving of orders for carrying into effect the purposes of the said Convention with relation to the taking, drying, and curing of fish by inhabitants of the United States of America";

and the other is the making of regulations containing—

"such restrictions as may be necessary to prevent such fishermen of the said United States from taking, drying or curing fish in the said bays or harbours "

of the non-treaty coast—

"or in any other manner whatever abusing the said privileges by the said treaty and this Act reserved to them."

And that function may be performed either by an order or orders to be made by His Majesty in Council or by regulations issued by the Governor or person exercising the office of Governor in the Colony.

Article 4 provides:—

"That if any Person or Persons, upon the Requisition made by the Governor of Newfoundland, or the Person exercising the Office of Governor, or by any Governor or Person exercising the Office of Governor, in any other Parts of His Majesty's Dominions in America as aforesaid, or by any Officer or Officers acting under such Governor or Person exercising the Office of Governor, in the Execution of any Orders or Instructions from His Majesty in Council, shall refuse to depart from such Bays or Harbours; or if any Person or Persons shall refuse or neglect to conform 'to any Regulations or Directions which shall be made or given.'"

Then he shall be punished. I should think it applied to both.

1260 JUDGE GRAY: And to British subjects as well, who may presume to interfere with treaty rights?

SENATOR ROOT: Certainly; it applies to everybody. I think it is a general clause, giving sanction to the execution of both of these powers. The power in the King in Council to give orders for carrying out and giving effect to the treaty, and the power in the King in Council and the Governors of the Provinces for restricting the abuse of the treaty rights on the non-treaty coast.

The Order-in-Council of the 19th June, 1819, appears at p. 114, and I begin to read at middle of p. 115 of the United States Case Appendix. It provides, after a recital of the treaty and the statute:—

"It is ordered by His Royal Highness the Prince Regent, in the name and on the behalf of His Majesty, and by and with the advice

of His Majesty's Privy Council, in pursuance of the powers vested in His Majesty by the said Act, that the Governor of Newfoundland do give notice to all His Majesty's subjects being in or resorting to the said ports that they are not to interrupt in any manner the aforesaid fishery so as aforesaid allowed to be carried on by the inhabitants of the said United States in common with His Majesty's subjects on the said coasts, within the limits assigned to them by the said Treaty; and that the Governor of Newfoundland do conform himself to the said Treaty, and to such instructions as he shall from time to time receive thereon in conformity to the said Treaty."

That, as the Tribunal will see, contemplates no regulation of the exercise of this right by the inhabitants of the United States.

The next step was the letter from Lord Bathurst communicating this Order-in-Council to the Governor of Newfoundland. That is in the British Case Appendix, p. 99, dated the 21st June, 1819, and says he encloses a copy of the Act, and that the inhabitants of the United States will undoubtedly proceed without delay to exercise the privilege granted to them under that Convention, and proceeds:—

"His Royal Highness has commanded me to call your special attention to some points upon which it is probable that in regulating your conduct under the convention you may desire to receive instructions.

"You will in the first place observe that the privilege granted to the citizens of the United States is one purely of fishery and of drying and curing fish within the limits severally specified in the convention. It is the pleasure of His Royal Highness that this privilege as limited by the convention should be fully and freely enjoyed by them without any hindrance or interference."

Then he goes on to say:—

"But you will at the same time remark that all attempts to carry on trade or to introduce articles for sale or barter into His Majesty's possessions under the pretence of exercising the rights conferred by the convention is in every respect at variance with its stipulations. You will therefore promulgate as publicly as possible the nature of the indulgence which you are under the convention instructed to allow to them, and in case any of the inhabitants of the United States should be found attempting to carry on a trade not authorized by the convention you will in the first instance warn them " and then take legal proceedings.

The Tribunal will see that that indicates no idea on the part of Great Britain at that time that there was to be any limitation, modification, supervision or regulation of our right; but that that was to be fully and freely enjoyed without any hindrance or interference.

And so the matter went on, with no act whatever in contravention of this letter of Lord Bathurst transmitting the Order-in-Council, without any attempt at interfering with the exercise of the fishing liberty by the inhabitants of the United States in their discretion or in the discretion of the United States, at such times and in such



manner and by such means as they saw fit, until 1852, when there was a letter from Lord Malmesbury to Mr. Crampton dated the 10th August, 1852, and which appears in the United States Case Appendix at p. 519. Lord Malmesbury, the Secretary of State for Foreign Affairs of Great Britain, writes to Mr. Crampton, the British Minister in Washington, in regard to the circular or proclamation, or public notice which the Tribunal will remember came from Mr. Webster at the time that the controversy about bays was at its height. Lord Malmesbury states for Mr. Crampton's benefit the views of the British Government regarding the rights laid down in the treaty of 1818. Beginning at the middle of p. 519, I read:—

“The rights are laid down in the treaty of 1818, as quoted by Mr. Webster; that is, undoubted and unlimited privileges of fishing in certain places were thereby given by Great Britain to the 1261 inhabitants of the United States; and the government of the United States, on their part, renounced forever any liberty previously enjoyed or claimed by its citizens to fish within three marine miles of any other of the coasts, bays, creeks, or harbors of the British dominions.”

The Tribunal will perceive that it is quite plain that the Foreign Office of Great Britain at that time took the same view regarding the American right that I am taking here. He says:—

“That is, undoubted and unlimited privileges of fishing . . . were given.”

That is in contrast to what he goes on to say about the bays, and seems to leave no doubt as to what the view of Great Britain then was.

The following year, on the 28th September, 1853, the Governor of Newfoundland wrote to Lord Newcastle a letter, which appears in the United States Counter-Case Appendix, at p. 247. This letter is discussing the history of the fishery with reference both to French and American rights, and it appears that the making of a treaty which ultimately resulted in the Convention of 1854 was mooted; and he says to the Colonial Office:—

“In any new convention that may be made,”——

That is, with France—

“it should be a *sine quâ non*, if the Sale of Bait is made a stipulation, that the right of purchase must be subject to such regulations as may be made by the Local Legislature for the protection of the breeding and the preservation of the bait; regulations that are now imperatively demanded, and without which the Bait in our Southern Bays will in time be exterminated. As regards the effect upon this part of the question of embracing Newfoundland in any Treaty of Reciprocity between the North American Colonies and the United States, by which the Americans may be admitted to a participation in our fisheries, it should, as I have no doubt it will, be provided that the citizens of the United States shall, equally with British subjects, be

subject to such Legislative Regulations as may be established for the protection and preservation of Bait. Regulations of this nature would, under such circumstances, be obviously matters of common interest to all."

It is apparent that the Governor of Newfoundland did not consider that the American Government was subject to the right of legislative regulations, and he wanted provision to that effect in case a new treaty was made.

The Tribunal is familiar with the report of 1855, to which reference has just been made, that down to that time there was no regulation in practical effect of any kind; so that, of course, the Americans could not have been regulated. Then, in 1862, the first Newfoundland act regulating fishing was passed, and in that act was included the saving clause that—

"nothing in this Act contained shall in any way affect or interfere with the rights and privileges granted by treaty to the subjects or citizens of any state or power in amity with Her Majesty."

I shall presently show the Tribunal that that was understood in Newfoundland to except Americans from the purview of the Act. That clause is continued in most of the statutes of Newfoundland which follow. There are a few short statutes in which it does not appear, but I think it may fairly be considered that those were regarded as amendments of acts in which it did appear, so that it would be operative. I do not know when the idea of Newfoundlanders changed about the effect of that saving clause. There is evidence which I shall present to the Tribunal that in 1862 they considered that the law they were passing did not apply to Americans. In 1905 they considered that their law did apply to Americans. Just where the change occurred I do not know. But the saving clause appears in their statutes of 1862, Consolidated Statutes of 1872, in their statutes of 1887, 1889, 1892, Consolidated Statutes, their "Foreign Fishing-Vessels Act of 1893," their Act establishing the Department of Marine and Fisheries in 1898, and "The Foreign Fishing-Vessels Act of 1905." The Act establishing the Department of Marine and Fisheries in 1898, provides:—

"Nothing in this Act or any rules and regulations to be made hereunder shall be construed to affect the rights and privileges granted by treaty to the subjects of any state or power in amity with Her Majesty."

So that it covered all regulations made under that statute by the department which is the department still in operation.

I say I do not know when the change occurred, but I do know that there was a considerable period during which Newfoundland did not consider that her fishery regulation statutes applied to Americans; and the first bit of evidence upon that point is in a letter from the Duke of Newcastle to Governor Bannerman of the



3rd August, 1863, which appears in the United States Case Appendix at p. 1082. This is headed: "Copy of a despatch from the Secretary of State for the Colonies in reply to a request from the Governor that a copy of a draft bill for regulating the fisheries may be looked over, and any parts pointed out, such as probably might not be sanctioned by the Crown."

This is the year after the Act of 1862 was passed—that first Act regulating the fisheries.

SIR CHARLES FITZPATRICK: Are these words in italics on the original document?

SENATOR ROOT: Well, I really do not know. Mr. Anderson can tell. Mr. Anderson calls attention to the fact that there is a preceding line: "Extracts from the journal of the Legislative Assembly of Newfoundland, 1864." That is where we got it.

SIR CHARLES FITZPATRICK: Yes.

SENATOR ROOT: And these words that I have read appear in that journal. I suppose they are the description of the despatch by the clerk or secretary, or whoever made up the journal; but it appears to be a correct description or syllabus of the letter.

The Duke acknowledges the letter of the Governor, and the copy of the proceedings of the committee appointed to inquire into the state of the fisheries, together with a draft Bill, and says:—

"I apprehend that it is not your expectation that I should express an opinion respecting the practical modes of conducting those fisheries."

And then he says:—

"The observations which suggest themselves to me, however, on the perusal of the draft bill are—

"1st. That if any misconception exists in Newfoundland respecting the limits of the colonial jurisdiction, it would be desirable that it should be put at rest by embodying in the act a distinct settlement that the regulations contained in it are of no force except within three miles of the shore of the colony."

I would stop on that if I were arguing Question 5 now; but I am not.

"2nd. That no act can be allowed which prohibits expressly, or is calculated by a circuitous method to prevent, the sale of bait.

"3rd. That all fishing acts should expressly declare that their provisions do not extend or interfere with any existing treaties with any foreign nation in amity with Great Britain.

"4th. That, in any part of the colonial waters, it would be highly unjust and inconvenient to impose upon British fishermen restrictions which could not, without violating existing treaties, be imposed upon foreigners using the same fisheries. On this point, however, I would refer you to my despatch, marked 'confidential,' of the 2nd of February."

That we have not.

The Tribunal will perceive there that the Colonial Office considered that the saving clause, which was made peremptory, precluded non-discriminating legislation affecting foreigners using fisheries under treaties—

“it would be highly unjust and inconvenient to impose upon British fishermen restrictions which could not, without violating existing treaties, be imposed upon foreigners using the same fisheries.”

That is non-discriminatory. His observation is that there should not be any regulation imposed upon British fishermen which could not extend to and cover foreign fishermen. And he manifestly understood that the fishermen under these treaties were outside of the power of regulation, and that that fact was good reason for not imposing a regulation which would apply to the British fishermen and could not apply to them.

The next circumstance is the correspondence and action in regard to the Newfoundland treaty legislation of 1873 and 1874. I have referred to that for a specific purpose, and I am going to ask the members of the Tribunal to bring their minds back to it in order to indicate another aspect of the correspondence and legislation which bears upon the proposition that I am now arguing. That is, that the two Governments did not consider that there was any right of municipal legislation to restrict the exercise of the American liberty.

The Tribunal will remember that the first law passed by Newfoundland to put the treaty of 1871 into effect, to make it apply to Newfoundland, contained a provision:—

“Provided that such laws, rules and regulations *relating to the time and manner* of prosecuting the fisheries on the coast of this island shall not be in any way affected by such suspension.”

1263 That is the suspension of statutes. On the 19th June, 1873,

Mr. Thornton wrote a letter which appears in the United States Counter-Case Appendix at p. 195, in which he proposes to Mr. Fish, the American Secretary of State, a protocol to supplement the treaty, relating to this proviso of the Newfoundland statute. I read from the paragraph in the middle of p. 195:—

“I am, therefore, instructed to propose to you to sign a protocol with regard to Newfoundland similar to that which I had the honor to sign with you on the 7th instant, with the addition of a clause following as nearly as possible the proviso at the end of the first article of the Newfoundland act, namely, that the laws, rules and regulations of the colony *relating to the time and manner of prosecuting the fisheries* on the coast of the island shall not in any way be affected by the suspension of the laws of the colony which operate to prevent articles 18 to 25 of the treaty of Washington from taking full effect during the period mentioned in the 33d article of the treaty.”



On the next day, Mr. Thornton wrote to Mr. Fish a letter which appears on p. 196, dated the 20th June, 1873, and I ask the particular attention of the Tribunal to this letter. It says:—

“With reference to my note of yesterday’s date and to our conversation upon the subject of the Act passed by the Legislature of Newfoundland for carrying into effect Articles 18 to 25 of the Treaty of May 8, 1871, I have the honour to state that from a report made by the Attorney General of Newfoundland to the Governour it would appear that the Proviso at the end of Section 1 of that Act has reference to the time for the prosecution of the Herring fishery on the Western Coast of the Island”——

That is, the treaty coast under the Act of 1818.

*“and was merely intended to place citizens of the United States on the same footing with Her Majesty’s subjects in that particular so that the rules and regulations imposed upon the Newfoundland Fishermen with regard to that fishery might also be observed by American Fishermen.”*

The Tribunal will see the force of that. The treaty of 1871 would, during its operation, supersede, take the place of the treaty of 1818. It applied to all the coasts of Newfoundland, and in so far as it varied or enlarged, or changed in any way the rights under the treaty of 1818, it would, during the period of its operation, take the place of the treaty of 1818, as the law for the parties engaged in fishing on that coast. Newfoundland had this law of 1862, and her Consolidated Statutes of 1872, although I do not know whether they should be regarded as included; at all events, she had this law of 1862, and she wanted to have its provisions extended over American fishermen. She knew they did not apply to American fishermen. She knew that the provision in that Act that it should not extend to or affect the rights of other powers under treaty prevented its applying to American fishermen; that under the treaty there was no right on the part of Newfoundland to make that statute apply to American fishermen. And she proposed to put this proviso in to her Act of 1873, in accordance with this statement, excepting from suspension laws relating to the time and manner of fishing, in order that when the treaty of 1871 came in, that statute should be extended over American fishermen on the west coast. Well, that was met by Mr. Fish’s refusal.

There was one further representation made by Mr. Thornton, based upon information that he received from Newfoundland, I suppose. He says in his letter of the 30th July, 1873, to Mr. Davis, the Assistant Secretary of State:—

“These laws”——

That is, the laws to which this correspondence referred: the laws referred to in the proviso, relating to the time and manner of fishing.

"are already in existence, and the proviso does not refer to any further restrictions; I have now the honor to inclose copies of the laws themselves. It does not appear therefore that these laws need form an obstacle to the admission of Newfoundland to the participation of benefits arising from the action of a Treaty stipulation, the operation of which is still prospective as far as Newfoundland is concerned."

That is to say, Newfoundland, even then, did not understand that a proviso to her suspension of statutes, during the life of the treaty of 1871—

"provided that such laws, rules, and regulations relating to the time and manner of prosecuting the fisheries on the coasts of this island, shall not be in any way affected by such suspension."

would apply to subsequent legislation. She seeks to get the treaty of 1871 supplemented by a protocol so as to permit this proviso to take effect, upon the ground that it does not apply to subsequent legislation, but only applies to past legislation, and that the sole object of it is to bring the Americans on the west coast in under the operations of the provisions of the Act of 1862, which did not then apply to them.

I hope my references to the Act of 1862 are intelligible to the Tribunal.

JUDGE GRAY: The Newfoundland Act of 1862?

SENATOR ROOT: Yes; the Newfoundland Act of 1862.

The treaty of 1871, which was for its life to supersede the operation of the treaty of 1818, required an Act by Newfoundland to make it applicable. Newfoundland passed the Act, suspending all laws inconsistent with the treaty, with a proviso that the suspension should not operate upon laws or regulations relating to the time and manner of fishing. And she asked for a protocol supplementing the treaty by the acceptance of that proviso, upon the ground that it would not apply to any subsequent legislation, and that its only object was to bring the American fishermen on the west coast in under the operation of the already existing statutes of Newfoundland, which, *a fortiori*, did not apply to the American fishermen at all; that is, statutes relating to the time and manner of fishing. Nothing can be clearer than that this authentic, authoritative position of the Government of Newfoundland, indicated through the British Minister at Washington, was in accordance with the view which I have been pressing upon the Tribunal.

I shall not detain the Tribunal by going over again the question about the Halifax case, further than to make the single observation that in that case the computation by the British counsel of the profits, the benefits which would be derived by the United States from the exercise of the treaty privileges conferred, were based upon the full exercise of the treaty rights, without any limitation as to time



or manner, and upon a consideration of the use in that exercise of the very methods of taking fish which are denounced by the laws of Newfoundland. So that the award, based upon those computations, must necessarily have been based upon an error of law if it had turned out that Great Britain was contending that the American fishermen, under the treaty of 1871, could not use methods or exercise that full scope of their industry, which would appear to be possible under the terms of the treaty, and which was counted upon and made the basis of the computation. As Mr. Evarts pointed out, the very law of Newfoundland which prohibits the winter fishery, that is, this Act of 1862 prohibiting seining from the 20th October to April, would, if applied, exclude our people from the winter fishery, which was one of the principal things that entered into the computation of the counsel for Great Britain before the Halifax Commission. They were put in the position, by Lord Salisbury's first view, that they had got an award based upon the right to carry on a profitable industry in Newfoundland, and then, before the award was made, came the proposition that, by the law of Newfoundland, American fishermen were prevented from doing that very thing.

I must now trouble your Honours by returning again to the Fortune Bay correspondence, because my former reference to it was only for a specific purpose, and it has an important bearing upon the matter that I am now presenting.

The Tribunal will remember that American fishermen in 1878, some twenty odd vessels, went into Fortune Bay for the purpose of catching fish. They went ashore, and were drawing their seines, and the inhabitants came and interfered with them, and there was a good deal of disturbance, and finally some of the nets were cut and the fish already taken were let out, and there was a claim for damages by the United States. To that claim for damages Lord Salisbury replied with a refusal, saying that they were violating three distinct laws of the colony. Thereupon Mr. Evarts, who was smarting a little under what we regarded in the United States as being a very excessive award on the part of the Halifax Commission, an award of 5,500,000 dollars that the United States was called upon to pay for the privileges under the treaty of 1871, wrote very promptly regarding the observation by Lord Salisbury about the three distinct violations of law, and I now read this from p. 655 of the United States Case Appendix, because it is the matter to which Lord Salisbury makes answer in his subsequent letter. Mr. Evarts says, beginning with the third paragraph on this p. 655:—

“In this observation of Lord Salisbury, this government cannot fail to see a necessary implication that Her Majesty's Government conceives that in the prosecution of the right of fishing accorded to the United States by Article XVIII of the treaty *our fishermen are*

*subject to the local regulations which govern the coast population of Newfoundland in their prosecution of their fishing industry, whatever those regulations may be, and whether enacted before or since the Treaty of Washington.*

"The three particulars in which our fishermen are supposed to be constrained by actual legislation of the province cover in principle every degree of regulation of our fishing industry within 1265 the three-mile line which can well be conceived. But they are, in themselves, so important and so serious a limitation of the rights secured by the treaty as practically to exclude our fishermen from any profitable pursuit of the right, which, I need not add, is equivalent to annulling or cancelling by the Provincial Government of the privilege accorded by the treaty with the British Government.

"If our fishing-fleet is subject to the Sunday laws of Newfoundland, made for the coast population; if it is excluded from the fishing grounds for half the year, from October to April; if our 'seines and other contrivances' for catching fish are subject to the regulations of the legislature of Newfoundland, it is not easy to see what firm or valuable measure for the privilege of Article XVIII, as conceded to the United States, this government can promise to its citizens under the guaranty of the treaty.

"It would not, under any circumstances, be admissible for one government to subject the persons, the property, and the interests of its fishermen to the unregulated regulation of another government upon the suggestion that such authority will not be oppressively or capriciously exercised, nor would any government accept as an adequate guaranty of the proper exercise of such authority over its citizens by a foreign government, that, presumptively, regulations would be uniform in their operation upon the subjects of both governments in similar case. If there are to be regulations of a common enjoyment, they must be authenticated by a common or joint authority."

That is a clear, definite, and unequivocal statement of Mr. Evarts' view. In closing the letter, in the last paragraph on page 657, he says:—

"In the opinion of this Government, it is essential that we should at once invite the attention of Lord Salisbury *to the question of provincial control over the fishermen of the United States* in their prosecution of the privilege secured to them by the treaty. So grave a question, in its bearing upon the obligations of this Government under the treaty, makes it necessary that the President should ask from Her Majesty's Government a *frank avowal or disavowal of the paramount authority of Provincial legislation to regulate the enjoyment by our people of the inshore fishery*, which seems to be intimated, if not asserted, in Lord Salisbury's note.

"Before the receipt of a reply from Her Majesty's Government, it would be premature to consider what should be the course of this Government should this limitation upon the treaty privileges of the United States be insisted upon by the British Government as their construction of the treaty."

And it is in answer to that demand that Lord Salisbury immediately responds in his letter of the 7th November, 1878. It is in this



answer that, after stating his view that he hardly believes Mr. Evarts would consider that no British authority has any right to pass any kind of laws binding upon Americans, he proceeds to say on p. 658:—

“On the other hand, Her Majesty’s Government will readily admit—what is, indeed, self-evident—that British sovereignty, as regards those waters, is limited in its scope by the engagements of the treaty of Washington, which cannot be modified or affected by any municipal legislation.”

I think the world knows enough of this great statesman, one of the best representatives of the English people who ever took part in international affairs—a great Foreign Secretary, a great Prime Minister—I think the world knows enough of him to know that he would repudiate with indignation the idea that he was in that answer attempting an evasion of the question of Mr. Evarts. The question was: “An avowal or disavowal of the paramount authority of provincial legislation to regulate the enjoyment by our people of the inshore fishery”; and the answer was: “That British sovereignty, as regards those waters, is limited in its scope by the engagements of the Treaty of Washington, which cannot be modified or affected by any municipal legislation.”

The answer must be read with the question to which it is an answer. And upon that, the Government of Great Britain stands to-day, by the declaration of her counsel including her Attorney-General.

In this letter, Lord Salisbury, after saying that if there had been inadvertent trespass upon the line, the limits, by any laws which contravened treaties, the matter should be taken up by the two governments, proceeds to say that Mr. Evarts has not specified any recent legislation which is supposed to pass the limits of the American right. Thereupon Mr. Evarts proceeds to specify, in his letter in reply, of the 1st August, 1879. He specifies [p. 671] the prohibition against “taking herring by the seine or other such contrivance between the 20th of October and the 12th of April,” and the prohibition against “taking herring between the 20th of December and the 1st of April with seines of less than” a certain mesh; and the prohibition against taking herring between the 10th May and the 20th October—that is the bank fishing season—within a mile of any settlement on the south coast; and the Sunday prohibition. And he advises Lord Salisbury that the rights of the United States, the treaty rights, are both “seriously modified and injuriously affected,” using Lord Salisbury’s words, by municipal legislation “which closes such fishery absolutely for seven months of the year, 1266 prescribes a special method of exercise, forbids exportation for five months, and, in certain localities, absolutely limits the

three-mile area which it was the express purpose of the treaty to open."

Thereupon Lord Salisbury makes another reply, in which he supplements and leaves no possibility of doubt as to the meaning and scope and effect of his previous declarations. That is in his letter of the 3rd April, 1880, which begins on p. 683 of the United States Case Appendix. He says in the second paragraph of the letter, on p. 683:—

"In considering whether compensation can properly be demanded and paid in this case, regard must be had to the facts as established, and to the intent and effect of the articles of the Treaty of Washington and the convention of 1818 which are applicable to those facts."

And he proceeds to a careful consideration of those instruments and their effect.

I shall ask the Tribunal also to observe that in the first paragraph he explains the delay in sending this letter by saying that it has been occasioned by the necessity of instituting a very careful inquiry, and the fullest consideration, and that the inquiry has now been completed. So this is a very deliberate, matured, and fully considered communication. Over on p. 684, at the top of the page, he says:

"Such being the facts, the following two questions arise:

"1. Have United States fishermen the right to use the strand for purposes of actual fishing?

"2. Have they the right to take herrings with a seine at the season of the year in question, or to use a seine at any season of the year for the purpose of barring herrings on the coast of Newfoundland?"

And he proceeds to answer both questions in the negative. The first question he answers in the negative upon an examination of the nature of the right conferred by the treaty of 1818 and the Treaty of Washington. And he describes the right. He says, at the beginning of the paragraph in the middle of p. 684:—

"Articles XVIII and XXXII of the Treaty of Washington super-added to the above-mentioned privileges"——

That is, the privileges which he had just recited from the treaty of 1818.

"the right for United States fishermen to take fish of every kind (with certain exceptions not relevant to the present case) on all portions of the coast," &c.

Then he says:—

"Thus, whilst absolute freedom in the matter of fishing in territorial waters is granted, the right to use the shore for four specified purposes alone is mentioned in the treaty articles, from which United States fishermen derive their privileges, namely, to purchase wood, to obtain water, to dry nets, and cure fish.



"The citizens of the United States are thus by clear implication absolutely precluded from the use of the shore in the direct act of catching fish."

The Tribunal will observe that, examining the treaty of 1818 and the treaty of 1871, he declares that *absolute freedom in the matter of fishing in territorial waters is granted*, and the right to use the shore for only specified purposes, and not in general. He finds, as a matter of fact, that the American fishermen went on shore; and therefore, he says, they were exceeding their treaty right.

He next proceeds to the second question, and upon that he says:—

"But it cannot be claimed, consistently with this right of participation in common with the British fishermen, that the United States fishermen have any *other*, and still less that they have *greater* rights than the British fishermen had at the *date* of the treaty."

I am now reading about two-thirds of the way down p. 685:—

"If, then, at the *date* of the signature of the Treaty of Washington, certain restraints were, by the municipal law, imposed upon the *British fishermen*, the United States fishermen were, by the *express terms* of the treaty, equally subjected to those restraints, and the obligation to observe in common with the British the then existing local laws and regulations, which is implied by the words '*in common*,' attached to the United States citizens as *soon* as they claimed the benefit of the treaty."

He then cites Mr. Marcy's circular as expressing that view,—the circular which related to laws which were in force at the time the treaty of 1854 took effect. Then he says, on p. 686:—

"I have the honor to enclose a copy of an act passed by the Colonial Legislature of Newfoundland, on the 27th March, 1862 . . . and a copy of . . . the consolidated statutes of Newfoundland, passed in 1872."

1267 Then he says:—

"These regulations, which were in force at the date of the Treaty of Washington, were not abolished, but confirmed by the subsequent statutes, and are binding under the treaty upon the citizens of the United States in common with British subjects."

He abandons the Sunday regulation passed in 1876 after the treaty of 1871 took effect and which was really the only thing in the minds of the Newfoundland fishermen, and plants himself strictly upon the proposition, not that the United States was subject to any subsequent legislation, but that the treaty made them subject to regulations which existed at the time the treaty was made; and in order to leave no doubt whatever of what he means, and the limit and force of it, he proceeds in the last paragraph of his letter on p. 687 to say:—

"Mr. Evarts will not require to be assured that Her Majesty's Government, while unable to admit the contention of the United

States Government on the present occasion, are fully sensible of the evils arising from any difference of opinion between the two governments in regard to the fishery rights of their respective subjects. They have always admitted *the incompetence of the colonial or the imperial legislature to limit by subsequent legislation the advantages secured by treaty to the subjects of another power.*"

There you have the full question and answer and specification and reply; a demand by Mr. Evarts for an explicit avowal as to whether Great Britain claims paramount authority of her legislation over the exercise of the treaty right; a response by Lord Salisbury that Great Britain concedes that "British sovereignty is limited in its scope by the engagements of the treaty, which cannot be modified or affected by municipal legislation"; a call by Lord Salisbury upon Mr. Evarts to specify what recent legislation he considers contravenes the treaty; a specification by Mr. Evarts of statutes, some within the life of the treaty and some prior to the life of the treaty; a reply by Lord Salisbury that the effect of the treaty, which conferred a right in common with Newfoundland fishermen, was to impose upon American fishermen regulations and limitations of the statutes existing at the time that treaty was made, but that they recognised the incompetence of Great Britain to limit by subsequent regulation the advantages secured by the treaty.

This answers to the definition finely drawn by the Attorney-General between mere admissions on the part of government officers and the acts of the government itself. This was the formal and the authentic action of the Government of Great Britain denying the claim for compensation on the part of the United States, and doing it in the face of the grave declarations made by Mr. Evarts regarding the course which it would be the duty of the Government of the United States to take if it should find that the claim of Great Britain to paramount authority over the exercise of the American right so far destroyed that right as to make it worthless.

JUDGE GRAY: The Sunday law had been enacted after 1871?

SENATOR ROOT: After 1871, yes; and it is abandoned by Lord Salisbury.

If there ever was a case in which the evidence was clear and incontrovertible of the positive position taken by one government towards another, it appears here in this record; and we are none of us at liberty to ignore it or to make a decision against it.

[Thereupon, at 4.15 o'clock P. M., the Tribunal adjourned until tomorrow, August 9th, 1910, at 10 o'clock A. M.]



THIRTY-EIGHTH DAY: TUESDAY, AUGUST 9, 1910.

The Tribunal met at 10 o'clock A. M.

THE PRESIDENT: Will you kindly continue, Mr. Senator Root?

SENATOR ROOT: There have been some transactions mentioned by counsel for Great Britain as constituting admissions on the part of the United States to the contrary view which has been maintained by Great Britain; that is, admissions on the part of the United States that there was a right, under the first article of the treaty of 1818 for Great Britain to limit and control the exercise of the liberty by municipal legislation.

Upon examination, those alleged admissions disappear entirely. I have already given an account of the Marcy circular for another purpose, sufficiently I think to show that the general proposition I have just made applies to that.

It is apparent, if the Tribunal will recall the circumstances, that there was nothing to the Marcy circular transaction except this: That when the provisions of the temporary and reciprocal treaty of 1854 were about to be put into effect, the Governor of New Brunswick suggested to the British Minister, and he to Mr. Marcy, the American Secretary of State, that the American fishermen would naturally be bound by the statutes which existed in New Brunswick. The statutes already existing in New Brunswick provided, he said, nothing inconsistent with the full exercise of the treaty right. Mr. Marcy looked at the statutes and found that they were statutes which were, in fact, beneficial to both, and he approved them, and sent out his circular, in which he enjoined upon the American fishermen observance of them. And in the circular, by common arrangement, he put the duty of observing the laws just as strongly as he could, to prevent the fishermen from being recalcitrant and taking matters into their own hands.

But, what he said was that all laws not inconsistent with the treaty were binding. Of course there was no admission of any kind there. It was what we all agree to on both sides. It was the fair statement, in the most general terms, of an incontrovertible proposition, without the expression of any opinion, and without any study or consideration as to what would be inconsistent with the treaty, or where the line was to be drawn.

JUDGE GRAY: Was there or not an implication in that circular, and in the correspondence that preceded and followed it, that the only regulations that were necessary to be considered and that would be applicable were those that existed at the date of the new treaty of 1871?

SENATOR ROOT: That was the clear implication, and that was the fact which Lord Salisbury mentioned when he quoted that circular

in his letter to Mr. Evarts to which I have already referred. He quoted that circular in support of his proposition that laws in existence at the time the treaty was made were binding, although subsequent laws would not be. He quoted that circular saying such was the view taken by Mr. Marcy, and that is clearly the only subject that Mr. Marcy had under consideration.

The next transaction to which is ascribed some element of injurious admission on the part of the United States is the Cardwell letter. On the 12th April, 1866, Mr. Cardwell wrote a letter—Mr. Cardwell being the Colonial Secretary of Great Britain—and the letter being to the Lords of the Admiralty, with reference to the conduct of British naval vessels. In that letter, which is quite long and contains a great variety of observations calculated to govern the conduct of naval vessels of Great Britain, he states the limits of the treaty grant, that Americans are entitled to take fish in such and such limits, cure them within such and such limits on the shore, and he includes a statement of what he apparently assumes as a matter of course, that naval officers should be aware that Americans who exercise their right of fishing in colonial waters—

DR. SAVORNIN LOHMAN: From what page are you reading?

SENATOR ROOT: Page 601 of the United States Case Appendix. I will read the full paragraph, just below the middle of the page:—

“On the other hand, naval officers should be aware that Americans who exercise their right of fishing in Colonial waters in common with subjects of Her Majesty, are also bound in common with those subjects, to obey the law of the country, including such Colonial laws as have been passed to insure the peaceable and profitable enjoyment of the fisheries by all persons entitled thereto.”

That letter, with that general observation embosomed in it, rested for four years without being communicated to anyone except to the persons to whom it was addressed and the officers, very probably, who were under them. But four years afterwards, on the 3rd June, 1870, the difficulties which led to the making of the treaty of 1871 being active, an active controversy on the bay question having arisen again, there was a correspondence on that subject between the British and the American authorities, and on p. 597 of the United States Case Appendix, at the top of the page, the Tribunal will find a letter from the British Minister (Mr. Thornton) to the American Secretary of State (Mr. Fish), dated 3rd June, 1870, in which he transmits a letter relating to the enforcement of the British view regarding the limits of American fishing in the bays. Mr. Thornton says, at the top of p. 597:—

“In compliance with instructions which I have received from the Earl of Clarendon, I have the honor to transmit for your information copy of a letter addressed by the Admiralty to the Foreign  
1269 Office inclosing copy of one received from Vice Admiral Wel-



lesley, commanding Her Majesty's naval forces on this Station, in which he states the names of the vessels to be employed in maintaining order at the Canadian Fisheries and forwarding a copy of the instructions which were to be issued to the commanders of those vessels."

"Maintaining order at the Canadian fisheries" was something which had nothing whatever to do with the treaty coast, or the exercise of the fishing right, or drying and curing under the treaty of 1818. It related solely to maintaining the line of demarkation between the waters which were renounced and the waters which were not renounced upon the non-treaty coast. The Tribunal will see that very readily, by reference to the instructions which are enclosed in this letter of Mr. Thornton's. There were a series of enclosures. The first enclosure in that letter on p. 597 is the enclosure marked No. 1, a letter from Mr. Vernon Lushington, from the British Admiralty, saying:—

"I am commanded by my Lords Commissioners of the Admiralty to transmit, for the information of the Earl of Clarendon, a copy of a letter from Vice Admiral Wellesley, dated April 27th, No. 151, stating that the *Plover*, *Royalist* and *Britomart*"——

The names of British vessels.

"are about to be despatched to the Bay of Fundy, and the Coasts of Nova Scotia and Prince Edward's Island for the protection of the Canadian Fisheries.

"Enclosed is a copy of the special instructions furnished to these ships."

Enclosure No. 2 is a letter from Vice-Admiral-Wellesley to the Admiralty telling when these vessels are to leave for the coast of Nova Scotia and Prince Edward Island, and enclosing a copy of the instructions which will be given to the ships by the Admiral.

Enclosure No. 3 consists of the instructions of the Vice-Admiral to the commanding officers of these ships that were on the way to Nova Scotia. And over on p. 600 the Tribunal will see that, as an annex to this third enclosure of Mr. Thornton's letter to Mr. Fish, is to be found this four-year-old Cardwell letter. The subject then under discussion was the old question of bays. That was the only subject under discussion. The subject to which Mr. Thornton's letter referred was that. The enclosures in his letter to Mr. Fish related to that. The question up was: What were British naval vessels going to do? What might they rightfully do in arresting, preventing, seizing American vessels in the great bays of Nova Scotia and Prince Edward Island—the non-treaty coast? Mr. Thornton did not send this Cardwell letter to Mr. Fish as a subject to which he called his attention. It was an annex to one of the enclosures in the letter relating to the bay subject, and in this annex to one of the series of papers relating to the bay question there was this letter;

and in this letter a single sentence which referred to an entirely different subject, a subject which was not under discussion at all.

Mr. Fish on the 8th June acknowledged Mr. Thornton's letter, and properly and naturally expressed some views regarding the subject-matter to which the letter related regarding the controversy about which the letter was written, regarding the practical question which was then before the two Governments. Upon that he points out a discrepancy between the terms of the instructions which Mr. Thornton had sent to him, and of certain other instructions which had been given; the difference being the difference between employing the 10-mile and the 6-mile limit, that is, applying the 3-mile or the 5-mile zone limit. That was relevant to the subject they were discussing. That was relevant to the subject that was up before the two Governments. Then he says (United States Case Appendix, p. 610) :—

“Without entering into any consideration of questions which might be suggested by the letter referred to, which I understand to be superseded by later instructions, I think it best to call your attention to the inconsistencies referred to, in order to guard against misunderstandings and complications. . . .”

Surely no one ever more effectively guarded himself against being understood to have made admissions and to be bound by irrelevant matter in the exhibits or appendices, annexes which happened to be in the mass of papers that had been sent him because they contained matter which was relevant to a subject under discussion, than Mr. Fish did here. Of course, in the practical conduct of government, as in the ordinary affairs of life, many subjects become mingled in the same paper, many papers have to be communicated, communicated because of their relevancy and materiality upon some subject which is under discussion. It is a matter of every-day experience that papers are sent to be examined with reference to their bearing upon a particular subject which is under discussion, and there may be a

1270 hundred matters in them which are not relevant or not important. Is the person who receives them obliged to sit down and construct elaborate arguments upon every subject that is touched upon in those letters, or is he to treat merely what is relevant and material, but as to matters which have nothing to do with the subject under discussion save himself by some general expression of this kind? It needed no general expression to save him; but he did include in this letter this clear and distinct statement, “without entering into any consideration of questions which might be suggested by the letter.” It is a pretty slender case that has to rest upon such a reed as that.

Another circumstance to which reference is made is what we have got in the habit of calling the Boutwell circular. The Boutwell circular was a circular sent by the Secretary of the Treasury in pur-



suance of a letter from the Secretary of State, Mr. Fish, in 1870, to the collectors of customs, in order that they might communicate with the American fishing vessels as they went out. The circular related exclusively and solely to the non-treaty coast, and it had no relation whatever, nor did a word in it have any relation whatever to the conduct of American fishermen, the obligations or duties or rights of American fishermen on the treaty coast, except as that might be contained in the fact that there was a quotation from the first article of the treaty of 1818, by way of stating an exception from the subject-matter. The circular was sent by Mr. Boutwell upon the request of the Secretary of State, contained in a letter of the 23rd April, 1870, which appears at p. 187 of the American Counter-Case Appendix. Of course the Secretary of State is the Minister of Foreign Affairs of the United States, and it is his business to express the views of the Government of the United States upon international questions, and not the business of the Secretary of the Treasury. Therefore the Secretary of the Treasury, in issuing a circular to his collectors of customs, in order to reach the fishermen, upon international questions, on the request of the Secretary of State, cannot be supposed to have intended to set up for himself an inconsistent position, or to do anything other than that which the Secretary of State had requested him to do. There is the strongest kind of presumption that he was, in following the Secretary of State, undertaking to do what the Secretary of State requested. I will ask the Tribunal to kindly consider that letter of Mr. Fish, the Secretary of State:—

“Hon. George S. Boutwell,

“Secretary of the Treasury.

“Sir,

April 23, 1870.

“I have the honor to enclose a copy of House of Representatives Ex. Doc. No. 239. 2d session, 41st Congress, and of a communication of the 14th instant, from the British Minister, relating to the measures adopted, and proposed to be adopted, by the Authorities of the Dominion of Canada, *for the exclusion from certain of the inshore fisheries within the jurisdiction thereof, of foreign fisherman.* I beg leave to suggest, that with a view to fully acquainting citizens of the United States interested in the fishing business in waters adjacent to the Dominion of Canada, these facts that a circular be issued at your earliest convenience to Collectors of the Customs at the ports of the United States in which fishing vessels are fitted out or to which they resort, enclosing to each of them, a sufficient number of copies of a printed notification for distribution among the fishermen and the business firms interested in the subject, setting forth *the material facts presented in the enclosed papers, and putting them on their guard against committing acts which would render them liable to the penalties prescribed by Canadian Laws, respecting inshore fisheries not open to the fishermen of the United States under the 1st Article of the treaty between the United States and Great Britain of 1818.*”

I hope the Tribunal will observe the perfectly clear and distinct limitation—

“putting them on their guard against committing acts which would render them liable to the penalties prescribed by Canadian Laws, respecting inshore fisheries not open to the fishermen of the United States under the 1st Article of the treaty between the United States and Great Britain of 1818.”

That was Mr. Boutwell’s warrant for issuing the circular, and that was his sole warrant for expressing any opinion regarding the international relations of the United States. Outside of that he had no more power and authority to express the views of the United States upon this subject than any man in the street.

But we are not left without definite information as to what led Mr. Fish to request this circular, and the limitations which he put upon the request; for it appears by the circular that the law to which it referred was a Canadian law of 1868. The circular appears in the British Appendix, p. 235. This is the first circular, I think, issued by Mr. Boutwell. He sends this out, under date of 16th May, 1870, and I read from the bottom of the page:—

“In compliance with the request of the Secretary of State, you are hereby authorised and directed to inform all masters of fishing vessels, at the time of clearance from your port, that the authorities of the Dominion of Canada have terminated the system of granting fishing licenses to foreign vessels, under which they have heretofore been permitted to fish within the maritime jurisdiction of the 1271 said Dominion, that is to say, within three marine miles of the shores thereof; and that all fishermen of the United States are prohibited from the use of such in-shore fisheries *except* so far as stipulated in the first Article of the Treaty of October 20, 1818.”

Then he quotes the article and proceeds:—

“The Canadian Law of the 22nd of May, 1868, . . . entitled ‘An Act respecting Fishing by Foreign Vessels,’ among other things, enacts,” &c.

And then follows a statement of the provisions of the Canadian law of May 1868. That law had been communicated to Mr. Fish and it was the origin of the letter from Mr. Fish requesting Mr. Boutwell to issue the circular. In the British Case Appendix, p. 628, is the law of 1868. That law begins with a provision that:—

“The Governor may, from time to time, grant to any foreign ship, vessel or boat, or to any ship, vessel or boat not navigated according to the laws of the United Kingdom, or of Canada, at such rate, and for such period not exceeding one year, as he may deem expedient, a license to fish for or take, dry or cure any fish of any kind whatever, in British waters, within three marine miles of any of the coasts, bays, creeks or harbours whatever, of Canada, *not included within the limits specified and described in the first article of the convention*



between His late Majesty King George the Third and the United States of America, made and signed at London on the twentieth day of October, 1818."

That is to say, the law which it was the purpose of Mr. Boutwell's circular to call to the attention of American fishermen and merchants, which it was the object of Mr. Fish in writing to Mr. Boutwell in issuing the circular to bring to the attention of Americans, in order that they might guard against incurring its penalties, was a law that by its express terms *excluded the treaty coast*. It applied to the waters of Canada—

"*not included* within the limits specified and described in the first article of the Convention between His late Majesty King George the Third and the United States of America made and signed at London on the 20th day of October, 1818."

So it did not apply to the Magdalen Islands, or to this strip of wilderness coast called Canadian Labrador. Practically those places were negligible in Canadian legislation until the most recent times. They were not thinking about them. There is not much law in Labrador. People get on by the law of common sense and good nature. As to the Magdalen Islands, I do not know how it is now, but back in the treaty days, they were the property of a single individual. At all events, this law to which this whole transaction related, was a law which specifically excluded from its purview the treaty coast—that small portion of the treaty coast which was within the Dominion of Canada.

But there was an order in council issued, giving effect to the law, and that order in council appears at pp. 230 and 231 of the British Appendix. Perhaps I should not have described it as an order in council. It was in the form of a report of a committee of the Privy Council, approved by the Governor-General. I do not know whether that should properly be called an order in council or not.

SIR CHARLES FITZPATRICK: When it is once approved, it becomes an order in council.

SENATOR ROOT: Very well, then; I will revert to my description.

At the end of p. 230 of the British Case Appendix, I read:—

"The Committee having had under consideration the reports of the Minister of Marine and Fisheries, dated respectively the 15th and 20th ult., in connection with certain despatches from Lord Granville, on the subject of protecting the fisheries of Canada, beg to recommend:

"That the system of granting fishing licences to foreign vessels, under the Act 31 Vic., c. 61, be discontinued, and that, henceforth, foreign fishermen be not permitted to fish in the waters of Canada."

The Tribunal will perceive that in that order in council they omitted the limitation which the statute contained; and when this statute was sent to the Government of the United States, it was sent

with the order in council. The correspondence appears at pp. 580 and 581 of the American Appendix.

Mr. Thornton—Sir Edward Thornton by that time, I think—sends to Mr. Fish, in a note of the 14th April, 1870, a copy of a despatch from the Governor-General of Canada, at the top of p. 580 of the American Appendix. In that despatch is a statement of the provisions of the Act of 1868 to which I have referred, and also a statement of the order in council to which I have referred, quoting the terms of the order in council—not quoting the limitation in the

Act, but quoting the words of the order: “that henceforth all 1272 foreign fishermen shall be prevented from fishing in the waters of Canada.” And thereupon Mr. Fish writes back to Mr. Thornton a letter which appears on p. 581, dated the 21st April, 1870, acknowledges the receipt of this statute and this order in council, and calls attention to the fact that the language of the order in council would appear to be broad enough to cover the treaty coast.

JUDGE GRAY: The treaty coasts of Canada?

SENATOR ROOT: The treaty coasts of Canada.

Mr. Fish says, after acknowledging the receipt of the note of Mr. Thornton:—

“I must invite your attention and that of her Majesty’s authorities to the first paragraph of the order in council of the 8th of January last, as quoted in the memorandum of the Prime Minister of the Dominion of Canada, accompanying the despatch of his excellency the Governor General, which paragraph is in the following language, to wit:

“That the system of granting fishing licence to foreign vessels, under the Act. 31 Vic. cap. 61, be discontinued, *and that henceforth all foreign fishermen be prevented from fishing in the waters of Canada.*

“The words underscored seem to contemplate an interference with rights guaranteed to the United States under the first article of the treaty of 1818, which secures to American fishermen the right of fishing in certain waters which are understood to be claimed at present as belonging to Canada.”

Mr. Thornton writes back to Mr. Fish a letter on the same page (581 of the United States Case Appendix) acknowledging Mr. Fish’s note and saying:—

“I am forwarding a copy of your note to the Governor General of Canada; but, in the meantime, I beg you will allow me to express my conviction that there was not the slightest intention in issuing the above-mentioned order, to abridge citizens of the United States of any of the rights to which they are entitled by the treaty of October 20, 1818, and which are tacitly acknowledged in the Canadian law of May 22, 1868, a copy of which I had the honor to forward to you in my note of the 14th instant.”



Subsequently, these were sent, and on pp. 587 and 588 may be found communications which straighten out the whole question in accordance with Mr. Thornton's assurance.

On p. 587 is a further letter from Mr. Thornton to Mr. Davis, the Assistant Secretary of State, enclosing a copy of a despatch from the Governor-General of Canada, to whose attention this question raised by Mr. Fish had been brought; and the Governor-General of Canada, it appears on this same p. 587, had sent to Mr. Thornton a report of the Minister of Marine of Canada, and that report appears on p. 588, together with a report of a committee of the Privy Council of Canada.

The Minister of Marine says in his report of 28th April, which was thus passed on to Mr. Fish, and which appears on p. 588:—

“that the wording of the minute of council referred to clearly shows, by providing for the prevention of ‘*illegal* encroachment by foreigners’ on the inshore fisheries of Canada, that the Canadian Government never contemplated any interference with rights secured to United States citizens by the treaty in question between the British and American Governments.”

. And towards the foot of that report, on p. 589, he says that the terms—

“in any case they could apply only to those waters within which our ‘in-shore fisheries’ are situated, and in which neither American nor other foreign subjects have any legal right to fish.”

So it appears that the broad words of the order in council were inadvertent in extending beyond the carefully limited terms of the treaty under which the order was issued; and we have here the most explicit and binding assurance to Mr. Fish that the statute and the order in council were both confined—or perhaps I should say that the order in council was subject to the same limits that the statute expressed, confining the operation of both to the waters of Canada not included within the grant of fishing rights by the treaty of 1818.

Then it is, after receiving this assurance, having this question resolved, that Mr. Fish sent to Mr. Boutwell a letter requesting him to issue a circular calling attention to this statute and order, and guarding against penalties respecting inshore fisheries not open to fishermen of the United States under the fishing grant of the treaty of 1818.

Under that, Mr. Boutwell issued the circular to which I have referred. And it so happened that along about that time there was an amendment passed by the Canadian Parliament to this Act of 1868. On the 20th of May, 1870, Mr. Thornton sent a little note to Mr. Fish, which appears on page 589 of the United States Case

Appendix, saying:—

1273 “With reference to my note of the 14th ultimo to the Secretary of State, in which I forwarded to him a copy of the

Canadian act respecting fishing by foreign vessels, of the 22nd of May, 1868, I have now the honor to enclose a further law of the 12th instant, repealing the third section of the above-mentioned act."

The act to which Mr. Thornton refers appears on p. 136 of the American Appendix, and the language which it repeals is:—

"Any one of such officers or persons as are above-mentioned, may bring any ship, vessel or boat, being within any harbor in Canada, or hovering (in British waters) within three marine miles of any of the coasts, bays," &c.

JUDGE GRAY: It does not repeal that, does it, Mr. Root? That is a substitute.

SENATOR ROOT: Yes, that is the substitute. The section which it repeals runs:—

"If such ship, vessel or boat be bound elsewhere, and shall continue within such harbor or so hovering for twenty-four hours after the Master shall have been required to depart, any one of such officers, or persons, as are above-mentioned may bring such ship, vessel or boat into port," &c.

That appears on p. 133 of the American Appendix.

JUDGE GRAY: Yes.

THE PRESIDENT: The change is that the requisite that the master was required to depart has been left out?

SENATOR ROOT: Yes.

THE PRESIDENT: That is the difference between the two acts?

SENATOR ROOT: Yes; it is a little more stringent.

THE PRESIDENT: A little more stringent?

SENATOR ROOT: It is a little more stringent, and does not give them quite so much opportunity for notice.

THE PRESIDENT: It is much more stringent, yes.

SENATOR ROOT: That having been received from Mr. Thornton, and, of course, being an amendment of the original statute, subject to all the limitations of the original statute, it was handed over to Mr. Boutwell, and Mr. Boutwell issued a new circular which included a reference to that amendatory statute, together with the original statute of 1868. That new circular is to be found in the British Case Appendix at p. 237; and in that new circular he included this sentence:—

"Fishermen of the United States are bound to respect the British laws and regulations for the regulation and preservation of the fisheries to the same extent to which they are applicable to British or Canadian fishermen."

Then he goes on to recite the Act of 1868 again, and the Act of May 1870, which amended it, by making the third section more



stringent; and he also inserts this clause, which is in italics in the copy in the British Case Appendix on p. 238:—

“It will be observed, that the warning formerly given is not required under the amended Act, but that vessels are liable to seizure without such warning.”

Well, now is it not plain that the whole subject-matter to which the circular related was the non-treaty coast, and that it had no reference whatever to the treaty coast? That the regulations for the preservation of the Canadian fisheries, which the fishermen of the United States were said by Mr. Boutwell to be bound to respect to the same extent to which they are applicable to British or Canadian fishermen, are the regulations in force and effect prescribed by these statutes for the preservation of the fisheries on the non-treaty coast to which the circular related, and in which he desired to warn American fishermen against incurring the penalties of these statutes which related to the non-treaty coast, and only to the non-treaty coast. These statutes were statutes for the preservation of their fisheries. They were statutes to prevent American fishing-vessels coming in under the colour of the right of shelter and repairs, and wood and water, and taking without leave or license, by device and deceit, the benefit of the Canadian fisheries away from the Canadians. Those statutes were binding upon our fishermen.

JUDGE GRAY: Would they or would they not have been binding if they had not referred to the preservation of the fisheries? If they had been merely acts of exclusion?

1274 SENATOR ROOT: Unless they excluded in contravention of the four purposes; except, within the limits of the treaty right to enter for those four purposes on what we call the non-treaty coast, all those laws were binding upon the Americans who went in there of course.

Now, to take a circular issued with express reference to one thing, limited to express terms to one thing, take the language of it and carry it over and apply it to something else, cannot add much strength to a case.

THE PRESIDENT: And American fishermen fishing in these waters without violating any of these regulations for the preservation of the fisheries would be punishable for the act of fishing itself, without having violated any of the acts concerning the preservation of the fisheries? Would the boat of an American fisherman have been forfeited if he had fished in non-treaty waters, without having violated any one of these regulations?

SENATOR ROOT: He could not fish in non-treaty waters without violating.

THE PRESIDENT: Yes, but if he did?

SENATOR ROOT: Fishing would be a violation.

THE PRESIDENT: Fishing would be a violation, yes. Without violation of regulations and with violation, would be slightly different, I think, in that case. The principal offence would be the fishing.

SENATOR ROOT: Yes, but that of itself would be a violation.

THE PRESIDENT: That of itself would have been a violation. Therefore it would not have been necessary to have a penalty attached to fishing, under certain circumstances, because the fishing itself would have been punishable.

SENATOR ROOT: Certainly, fishing itself would be punishable. There were provisions relating to boats "preparing to fish" as leading so directly to the act itself as to amount to a substantive offence in itself. We may readily conceive quite appropriate regulations to prevent the privilege of shelter, repair, wood, and water, from being abused by fishing; regulations quite consistent with those, but necessary to prevent the abuse, and designed for that purpose; regulations not in themselves pointing to fishing. So that there might well be regulations which might be violated by American fishermen on the non-treaty coast—regulations appropriate and necessary to prevent an abuse, and designed for the protection of the fisheries, and by which they would be bound.

I do not suppose Mr. Boutwell refined about it as much as we may in discussing it, but what he was talking about was regulation on that non-treaty coast. That is perfectly clear. And it is perfectly clear there were provisions designed for the preservation of the fisheries answering to his description:—

"Fishermen of the United States are bound to respect the British laws and regulations for the preservation of the fisheries to the same extent as they are applicable to Canadian fishermen."

Speaking only of the non-treaty coast. That is quite a reasonable proposition, and not anything inapplicable to the non-treaty coast.

So that I think the Boutwell circular goes with the Marcy circular and the Cardwell letter, and there is nothing left at all of the Boutwell circular, for nowhere on either side in any transaction, letter, or reported interview, or written or printed matter, is there any expression of opinion of any kind regarding the rights and powers of the respective parties, or their subjects or inhabitants upon the treaty coast.

As to the Marcy circular, and as to the Cardwell letter, there is nothing to be said, except that in each case a British official, not of the Foreign Office, and not charged with interpreting the position of the Government of Great Britain upon an international question, expressed an opinion involving the natural assumption that British law was supreme in British territory, without adverting to any question of distinction between the general jurisdiction, and jurisdic-



tion over fishery, and without any consideration or study or discussion of the subject of the scope or the power and authority under the treaty of 1818. One of those opinions was expressed by Mr. Cardwell in 1866; another expressed by the British Minister and Lord Clarendon in 1855. They were both completely disposed of when the Governments themselves, through their authorised representatives, their foreign offices, took up and considered and dealt formally and authoritatively with the question of the rights and powers created by the treaty of 1818, both in the correspondence and action regarding the Newfoundland legislation of 1873 and 1874, and in the Evarts-Salisbury correspondence of 1878, 1879, and 1880.

1275 So it rests, that for sixty-two years after this treaty of 1818 was made, there was no position taken by the Government of Great Britain that involved the assertion of a right to alter, or modify, or limit, or restrain the discretion of the United States in determining the time and manner in which the liberty to fish should be exercised.

On the contrary, time after time the Government of Great Britain by its authorised representatives, assented to and asserted and based its argument and position upon the non-existence of any such right on the part of Great Britain, and the existence of a discretion on the part of the United States; and, it rests, that for thirty-seven years after the treaty was made no British official, however casually, ever expressed a doubt or question regarding the right of the United States to exercise its own discretion in determining the implements it should use in taking fish on the treaty coast, and the times when it should take the fish.

Now, I want to group together four expressions upon this subject which have occurred in the transactions which I have been detailing, but which have necessarily been presented at widely separated points in my argument.

First, Lord Bathurst in the paper which formed the basis of the negotiation in 1815 described the American right under the treaty of 1783 as the claim of an independent State to occupy and use at its discretion any portion of the territory of another.

SIR CHARLES FITZPATRICK: Just for convenience, will you give the page?

SENATOR ROOT: Page 274 of the American Appendix. And, I will observe there, that while it is true, as Chief Justice Fitzpatrick observed yesterday, that Lord Bathurst is speaking with reference to the prior letter to Mr. Adams, which he is answering, it is not Mr. Adams's characterising of the right which is expressed here, it is Lord Bathurst's characterising of the right. Mr. Adams had claimed that the rights of the United States under the treaty of 1783—which

they have been enjoying since the treaty of 1783—were rights of original possession, rights which they had independently of the treaty, and for the purpose of controverting that claim, Lord Bathurst states what the right is, declaring that it can rest only in conventional stipulation:—

“The claim of an independent State to occupy and use at its discretion any portion of the territory of another.”

And he says:—

“It is unnecessary to inquire into the motives which might have originally influenced Great Britain in conceding such liberties to the United States.”

Those are the liberties that were conceded, according to Lord Bathurst, the liberties he has described, the liberty of an independent State to occupy and use at its discretion a portion of the territory. He says: It is unnecessary to inquire what influenced Great Britain in conceding such liberties, and whether the other articles of the treaty did or did not in fact afford an equivalent for them, describing what was in fact done. This liberty is a liberty which was conceded, and it is unnecessary to inquire whether the treaty contained adequate compensation for them, and the liberty is that of an independent State to occupy and use at its discretion the territory of another.

Second, the description by Lord Malmesbury, in 1852, where he, Secretary of State of Great Britain, as Lord Bathurst was at the time of his letter (p. 519, American Appendix), describes our right in these words:—

“The rights are laid down in the treaty of 1818, as quoted by Mr. Webster; that is, undoubted and unlimited privileges of fishing in certain places were thereby given by Great Britain to the inhabitants of the United States;”

Undoubted and unlimited privileges of fishing.

The expression of the Legislature of Newfoundland in the request for a supplementary protocol which should make the proviso of the Newfoundland Act of 1873 operative, upon the acceptance of the treaty of 1871, when Sir Edward Thornton, the British Minister, speaking at the instance of the Government of Newfoundland, in his letter of the 20th June, 1873 (p. 196 of the American Counter-Case Appendix) declares that that proviso, which in terms reserves to Newfoundland the right of regulating the time and manner of prosecuting the fisheries, had reference to the time for the prosecution of the herring fishery on the west coast of Newfoundland, and was merely intended to place citizens of the United States on the same footing with Her Majesty's subjects in that particular, so that the same rules and regulations imposed upon Newfoundland fisher-



men with regard to that fishery might also be observed by American fishermen.

1276 The expression of Lord Salisbury, another great Secretary of State for Foreign Affairs, appears in the United States Case Appendix at p. 684, in his often-quoted letter of the 3rd April, 1880, where he bases his argument for the rejection of the American claim for damages upon this proposition as to the treaty of 1818 and the treaty of 1871. I read his words:—

“Thus whilst absolute freedom in the matter of fishing in territorial waters is granted, the right to use the shore for four specified purposes alone is mentioned in the treaty articles.”

“The right of an independent nation to use the territory of Great Britain at its discretion,” “the unlimited right of fishing,” “absolute freedom in the matter of fishing.” Those are the words of three great British Secretaries of State for Foreign Affairs, used in describing the American right for the purpose of passing upon the character of the right, and stating the position that Great Britain was taking in controversies with the United States.

And, those descriptions of the character of the American right are in consonance with the rules of construction that obtain in England and America, and I believe obtain throughout the civilised world, for it is the law, and it was then the law, that where by grant, or by deed or contract, a right is given by one to another to do a thing which involves the exercise of discretion as to time, when, and manner in which it shall be done, and there is silence as to who shall exercise the discretion, the discretion is vested in the person who has to do the thing. And that is the law of England, and the law of America, and, while I speak with the greatest diffidence in the presence of gentlemen who have wide experience of the systems of law under which I have not lived, I believe it to be the universal law, for it was the law of Rome. The grant of an *iter* or a *via* under the Roman law gave to the grantee the right to say where he should lay out his path or his road; subject always to the rule of common sense, that he must not exercise his discretion in a way unnecessarily and burdensomely to injure.

These great and authorised representatives of Great Britain were without question applying to the construction of this grant the ordinary and natural rule of construction. They might well have added, and to support the view they took, the view the British Government took for sixty-two years after this treaty was made, the view the makers of the treaty took, and we may add another principle of construction which is binding upon us; that we must construe the grant of a deed or a contract in such a way as to make it effective, and we are not at liberty to construe it in such a way as to destroy the grant; and, to construe this grant now upon this new

and latter-day theory, to construe this grant in such a way as to reverse the ordinary application of the canon of construction, and to carry the discretion, not to the person who has to do the act, but to the person who has granted the right to do the act, and make the exercise of the right subject to the power of the grantor of the right, in its uncontrolled judgment, to limit and restrain, is making it bear in its own breast the seeds of its own destruction.

We may add to the support of the British position in all that long period before the pressure of the Newfoundland trader began to warp the expression and the action of British statesmen—we may add in support of that earlier position the rule that the words of a grant by deed or contract are to be construed in the sense in which the grantor had reason to believe the grantee understood them, a rule of morality, a rule of good faith and honour; and here, without contradiction, is the evidence as to how the grantee of 1818 understood this grant in the statement of Mr. Gallatin, which stated that the right was regarded as what the French civilians call a servitude.

When we attempt to read into this grant, contrary to the accepted principles of construction, contrary to the construction of the makers and the construction of the two countries, a right of the grantor to modify and change, to what do we appeal? To nothing but the fact that Great Britain is sovereign there, and that from the fact of sovereignty must be implied the right to control.

Did anyone ever hear of applying such a rule to the powers of ownership? If an owner of land grant to another the right to make use of the land to the extent of the use granted, he excludes the exercise of his powers of ownership. Did anyone ever hear of a claim that he could regulate, modify, or restrict the exercise of the right granted because he was the owner? He may think it is for the common benefit that the right that he has granted may be restricted and modified; but did anyone ever hear that because he was the owner he alone was entitled to judge? Common sense says that when a nation grants to another nation a right to be exercised in its territory the grant puts a limitation upon the sovereignty, which limitation goes as far as the grant does, and there is no room within the limit of the grant for an implication arising from the fact of sovereignty.

1277 Now, I have argued Question No. 1 in the main upon the proposition that the grant of the treaty of 1818, being a grant to an independent nation, there was, by the controlling, or one of the controlling, features of the grant, carried into it by the use of the word "forever," the conveyance of a real right. I have argued that the Tribunal was bound to give effect to that dominant feature of the grant, and could give effect to it only by treating it as a real right, because mere obligatory rights end with war and end with a change



of sovereignty. But that position, while, in the judgment of counsel for the United States, it is a true and sound position, is not necessary to reach the result with which the Tribunal has to deal now and here. So long as the contract exists, whether it be a real right that is created or an obligation, as I have already observed incidentally, the Tribunal must treat it as binding, and enforce the limitations which it imposes upon the exercise of the sovereignty of Great Britain.

There is this difference between the results which would follow from treating this right that passed to the United States by the ratification of the treaty of 1818 as a real right, on the one hand, and treating it as an obligation in terms perpetual on the part of Great Britain, on the other hand. The first difference in the nature of the right is that in the first view the treaty would be deemed to take out from Great Britain a fragment of her sovereignty itself, and from that it would follow as a logical conclusion that Great Britain could not order, regulate, control, limit, or restrict the right that had passed to us because it was not hers.

SIR CHARLES FITZPATRICK: The property had passed from her?

SENATOR ROOT: It had passed. She had no more right to do that than one would have the right to continue ordering any piece of property that he had conveyed away. On the other hand, if this is to be regarded as not creating a real right, but as creating an obligation, Great Britain is prevented from exercising control, limitation, or restriction over the right which passed by her obligation, and therefore the obligation is such that it excludes her from doing that thing. We are all agreed that the contract, whether creating a real or an obligatory right, did limit British sovereignty. Great Britain, by her Attorney-General, quotes the words of Lord Salisbury, in which he says that:—

“British sovereignty, as regards those waters, is limited in its scope by the engagements of the Treaty of Washington, which can not be modified or affected by any municipal legislation.”

And the Attorney-General says:—

“That is the position we take to-day.”

He further says:—

“I cannot anticipate that with regard to these principles any difference will be found to exist between the views of the two Governments.”

The Attorney-General says further in his argument that:—

“The right of exclusion is a sovereign right, and that right is limited, in fact quoad particular persons it is abandoned; I limit my sovereignty to the extent of saying I will not exclude you.

“JUDGE GRAY: Then it becomes, in that view of it, confining yourself to what you have just said, a question of the extent of the limitation upon sovereign power?

"SIR WILLIAM ROBSON: Yes. Of course every contract is a limitation, as I have so frequently said."

He says further:—

"They"—

The United States.

"want something more than mere restriction of sovereignty. They want to have it established that when a United States inhabitant comes in, not merely is the sovereign right of Great Britain restricted to the extent that it cannot put him out, but they say it cannot govern him when he is there in the exercise of his right."

So, we are all agreed and it is to be taken as a law of this case that this contract, whether it be a real right, in our view, or whether it be obligatory, in the view of Great Britain, does restrict the sovereignty of Great Britain.

Now, there is a restriction of sovereignty, and from that restriction follows a binding obligation which limits the power of Great Britain to deal with the right which she has contracted away.

There is a second difference—this one as to result. If this be a real right, as we think it is, the United States would have a right of control over the conduct of its citizens in the exercise of the real right in this territory, and laws made to govern the time and manner in which they exercise that right would be laws which, for their validity, required the assent of the United States. They would be invalid, as affecting its citizens, but for the assent of the United States. The law-making power of Great Britain would not be "competent," to use Lord Salisbury's language, to make what would be a law binding upon the citizens of the United States without the assent of the United States, as an element in the law making.

On the other hand, if the treaty creates an obligatory limit upon Great Britain, if the limitation of her sovereignty is a limitation created by perpetual obligation, and if the exercise of the sovereign power of Great Britain in that territory makes a law, which oversteps the limit of her obligation, which she was bound in the contract not to make, that is a wrongful exercise of her sovereignty, from which this Tribunal is bound, if it can see it, to restrain her, because this Tribunal is to enforce the obligation wherever the obligation is. I hope I make the distinction clear.

THE PRESIDENT: Very clear.

SENATOR ROOT: The practical result would be that if you say this is an obligation which prevents Great Britain from rightfully making certain laws, then, while Great Britain would have the sovereign power to make the laws, she would be precluded by your Award from making them, or putting them into force, until she had got the concurrence of the United States in their being reasonable, fair, neces-



sary, and proper for the regulation of the common right. But so long as no war has intervened to put an end to this right, so long as no change of sovereignty has come, while Great Britain is sovereign, the parties stand as they stood when the treaty was made, and you reach the same practical result, with the exception of the distinction which I have just made.

SIR CHARLES FITZPATRICK: The difficulty, Mr. Root, with regard to assent is that I cannot understand how, constitutionally, the assent of the Government of the United States could give effect to British legislation. As to your second proposition, I think there is a great deal to be said in favour of it, at all events; but as to the other question, I do not quite understand how your assent could give effect to British legislation. I think your theory would drive you necessarily to the conclusion that if the United States were to exercise its right, on the assumption that sovereignty had been parted with, you would be the sole arbiter, the sole judge of the action of your own citizens with respect to the exercise of the treaty right in British waters. I think that is the logical conclusion, and in the Constitution of the United States you might find some difficulties.

SENATOR ROOT: I see that very probably there will be constitutional difficulties, but we have to treat this case upon the theory that this treaty is a valid treaty, and that it is constitutionally valid.

SIR CHARLES FITZPATRICK: It is not as to the constitutional validity of the treaty, but it is as to the constitutional exercise of your assent.

SENATOR ROOT: Perhaps I do not quite catch your meaning.

SIR CHARLES FITZPATRICK: However, I do not think it is very important, in view of your second position. In view of your second position, I do not think we need trouble ourselves about assent.

SENATOR ROOT: The practical result you reach now would be the same, although you would reach it by a little different process of reasoning. I do not think we need trouble ourselves where this iter or via goes.

SIR CHARLES FITZPATRICK: Except that the iter and viator must go where the grantor stipulates—with all due deference.

SENATOR ROOT: They must go to a point, if a point is prescribed. They must go where the grantor stipulates, if the grantor settles it in the grant. They must go where the contract provides, if the contractor settles it in the contract.

SIR CHARLES FITZPATRICK: Yes.

SENATOR ROOT: If he does not say anything about it, then they must go where the person who is to do the going settles it in the exercise of his discretion.

SIR CHARLES FITZPATRICK: And it is not to be settled by the person who is to suffer the burden?

1279 SENATOR ROOT: No. You cannot drive your ox-team along the via through a man's house; you must not make the burden unnecessarily grievous, but the discretion is in the person who does the thing unless there is a limit put in the contract.

THE PRESIDENT: In that respect is there an analogy between the position of the private proprietor and the sovereign of a State in dealing with such a real right? The private proprietor cannot decide the question how the entitled may use his right because he consults only his personal interest, whereas the sovereign of a State has to consider not only his personal interest, but the interest of a large community. Is the position, therefore, of the private proprietor, in that respect, strictly analogous with the position of the sovereign of the State?

SENATOR ROOT: The private proprietor may have a large family.

THE PRESIDENT: Of course, but he has only enlarged individual interests.

SENATOR ROOT: The sovereign of the State is the community, and the interests of this particular kind of grant are diverse interests, as I pointed out yesterday. There is no such common interest that the proprietor could be deemed to be invested with a trust to be exercised impartially and judicially for the benefit of both of the competing classes.

Now, under this theory of obligation, as I have said, it is agreed equally as upon the theory of perpetual right, that the sovereignty of Great Britain, is limited; and it remains that there can be no implied reservation of the rightful exercise of the sovereign power of Great Britain within the field covered by the grant, because, the very essential purpose of the grant being to limit the rightful exercise of British sovereignty as to that subject-matter, the exercise of the sovereignty is excluded just so far as the grant goes, and when the terms of the grant have been read no limitation can be imposed upon them derived from the existence of the sovereignty, or the nature of the sovereignty, which it was the purpose of the grant to limit and exclude from rightful exercise.

In this case of obligation, as in the case of real right, the terms of the contract control, and those terms cannot, consistently with the contract, be subjected to the exercise of any power not found in the terms of the contract, or of any power which is imported into the contract from the fact of the sovereignty which it was the object of the contract to limit and exclude.

In this case, as in the other, the terms of the contract assure to the United States, for its inhabitants, the right in common with British subjects, to take fish without expressing any limitation upon the exercise of that right, without expressing or suggesting any authority in the grantor of the contract right to say that the right shall not be



exercised at any time or in any manner which the grantee of the right deems proper to the exercise thereof.

In this case, as in the other, we are precluded from considering that the grantor nation, which had by the grant excluded itself from the rightful exercise of its sovereignty, within the field covered by the grant, should assume to exercise over the subject-matter of the grant an authority which, in its nature, would make it possible for the grantor practically to destroy the value of the grant.

In this case, as in the other, we are precluded from considering that it was within the contemplation of the parties that the grantor should continue to exercise an authority in respect of the subject-matter of the grant which, when applied to the grant in terms perpetual, would, in the ordinary course of human affairs, ultimately lead to the desire coupled with the power to destroy the value of the grant.

We are precluded from considering that the right vested in the grantee by the contract is to be treated by the grantor as being of a lower degree of sanctity and inviolability than the common right declared by the contract to remain in the subjects of the grantor.

We are precluded from considering that it was the intention of the parties that the common right of the grantee should be subject in its exercise to the control of the grantor, while the equal common right of the grantor was not to be subject to control by the grantee.

In this case, as in the other, the principle of equality of right resting upon the contract remains as inviolable as the principle of equality of right resting upon the ownership of a right by an independent nation to which it has been conveyed, according to the American view.

There is no principle of law or reason which justifies one party to a contract in limiting or modifying the exercise of the other party to the contract in accordance with the first party's own judgment as to what is for the common interest irrespective of the judgment of the other party to the contract. There is no warrant for assuming in this case, more than in the other, that in the absence of express provision in the contract the parties intended that one party to the contract should exercise such a power over the rights of the other party.

When Great Britain concedes, as she does in the statement of Question 1, that regulations of the common right must be reasonable, necessary, fair, &c., she concedes a limitation upon her sovereignty which precludes the exercise of her sole judgment to impose restrictions in her sole will. When Great Britain argues, as she does here, that there was an implied reservation of the sovereignty which enables, justifies, or authorizes her to be the sole judge of what is reasonable, necessary, and fair, she reinstates in her conception of her rights the very principle that she abjured when she put into the statement of

her contention in Question 1 the principle of reasonableness, necessity, and fairness. She is not at liberty to abjure it. She has precluded herself from it by the contention of Question 1, which puts the test of reasonableness, fairness, and necessity into the exercise of the liberty, and she is not at liberty to make that test an illusion, to destroy it, to withdraw it by saying: My will, my judgment alone, shall be sovereign—as she does say when she arrogates to herself the sole right to decide; and there is no more right to destroy the test under the theory of obligatory relation than under the theory of a real right. Great Britain is not at liberty to stand, on the position she asserts here, upon either theory, that her judgment and her will, or the judgment that she has handed over to the Legislature of Newfoundland, in its will, shall make and put into force a law which shall bind our fishermen in the exercise of our right, under which our vessels shall be seized and forfeited, under which men shall be arrested, under which our fishermen shall be kept off the coast and shall be prevented from following their industry and exercising it profitably, on the faith that at some future day we will carry an appeal to the Government of Great Britain, then an appeal to a tribunal to be created in the future, and all the time suffering the slow process of diplomatic correspondence pending the framing of the submission, pending the framing of the questions, the selection of the arbitrators, and the creation of such a feeling on the part of both countries as to justify their governments in making an appeal, while all that time the judgment—the uncontrolled, sole judgment—of the Legislature of Newfoundland is, according to the British theory, to be in effect and operation.

It requires a long, long period of accumulated grievances to move two great nations to an arbitration. Many a fisherman has worn out his life waiting upon that slow process. I know men working for day's wages now who, ten, fifteen, or twenty years ago, were masters of ships, and who have a claim that never yet has reached final decision and fruition. It is not one grievance, or two, or a dozen, but through the long process of years an accumulation of grievances must occur before the humble fishermen of the United States can move two great countries to an arbitration.

Now, I say against the exercise of the uncontrolled power of the Legislature of Great Britain, or the Legislature of Newfoundland to make and put into force provisions relating to the time and manner of the exercise of this treaty right, under the obligatory view, as under the real view, the concession of Great Britain, in the statement of Question 1, stands as a barrier; and under the obligatory view, as under the real view, against that position, stands always the definition of international law by the great Mansfield—Justice, equity, convenience, the reason of the thing. I care little by what



pathway you reach your conclusion, because I am so optimistic as to believe that this great empire of Britain will continue so long as cod-fish swim around the shores of Newfoundland, and that never, during all these long ages, will there be another war between Great Britain and the United States.

When I made a statement regarding the Roman Law to the effect that if a man grants an iter or a via over his land to another, the discretion to determine where to lay out the iter or the via was in the person to whom it was granted, I think there were some symptoms of doubt or dissent.

SIR CHARLES FITZPATRICK: Yes, I think you can attribute that to me; I will take the responsibility for that.

SENATOR ROOT: My own authority as a civilian, is too little to let that statement stand by itself, and I beg to cite as authority a section of the Digest of Justinian from Mr. Munro's translation. The work was produced at Cambridge by a Fellow of Gonville and Caius College, Cambridge, and published in 1909, second volume, 65th page,

9th paragraph of the first title of the book. Digest 5:—

1281 "If a via over anyone's land is conveyed or bequeathed to a man without more," [a note says the Latin word here is "simpliciter." If a via over anyone's land is conveyed or bequeathed to a man "simpliciter"] "he will be at liberty to walk or drive without restriction, that is to say over any part of the land that he likes; only, however, in a reasonable way, as the language which people use is always subject to some tacit reservation. The party cannot be allowed to walk or drive through the house itself, or straight across the vineyards, when he might have gone some other way with equal convenience and with less damage to the servient land."

You will see that sustains the same proposition which is stated in section of the Code Civil of 1804 to which I referred as elucidating Mr. Gallatin's reference to the French civilians.

And there is another authority running along a cognate line of contract which was so great an authority at the time when this treaty of 1818 was made, that I think it may be interesting for the Tribunal to have it.

It is in Hargrave & Butler's "Coke upon Lyttleton."

In 1818, this was a book of very great authority. It had been published and republished in many editions, and this particular book which I read is an American edition published in Philadelphia in 1827, from the last London edition which was published in 1818, the very year of the negotiation of the treaty. Lord Coke says:—

"Fourthly, in case an election be given of two several things, always he which is the first agent, and which ought to do the first act, shall have the election. As if a man granteth a rent of twenty shillings, or a robe to one of his heirs, the grantor shall have the election: for he is the first agent, by the payment of the one, or delivery of the other.

So if a man maketh a lease, rendering a rent or a robe, the lessee shall have the election *causa qua supra*. And with this agree the books in the margent. But if I give unto you one of my horses in my stable, there you shall have the election; for you shall be the first agent by taking or seisure of one of them. And if one grant to another twenty loads of hazle or twenty loads of maple to be taken in his wood of D., there the grantee shall have election; for he ought to do the first act, *scil.* to fell and take the same."

You see, Lord Coke there is referring to the rule in the transactions of every-day life in England, and this book, and the customary law which it records, so entered into the life of the English people, that very well-informed gentlemen like these negotiators on the part of Great Britain must have known of the rule which it records—very well-informed gentlemen belonging to the class from which Great Britain took her Chancellors of the Exchequer, like Mr. Goulburn, and her Prime Ministers, like Mr. Robinson.

THE PRESIDENT: The Court will adjourn until 2 o'clock.

[Thereupon, at 12.5 o'clock p. m., the Tribunal took a recess until 2 o'clock p. m.]

AFTERNOON SESSION, TUESDAY, AUGUST, 9, 1910, 2 P. M.

THE PRESIDENT: Will you kindly continue, Mr. Senator Root?

SENATOR ROOT: Before leaving the subject upon which I was speaking before noon, I wish to cite another rule of construction which, with acknowledgment to the Attorney-General, I will take from his argument. I read from p. 5819 of the typewritten copy [p. 989 *supra*]. Says the Attorney-General:—

"It is scarcely necessary, but I will read here just one passage from Oppenheim, upon the question of interpretation, in order that I may not appear to be submitting these facts as merely my own ideas, but to fortify myself with the name of some authority; though, in truth, I do not think any authority is needed by the Tribunal for such a proposition.

"Oppenheim says, at page 559:

"It must be emphasized that interpretation of treaties is in the first instance a matter of consent between the contracting parties. If they choose a certain interpretation, no other has any basis. It is only when they disagree that an interpretation based on scientific grounds can ask for a hearing; and these scientific grounds can be no other than those provided by jurisprudence."

"I read that because it is not quite the same as most municipal laws. I have very little knowledge of the laws of any country except my own, but I can well imagine that municipal law might provide that the construction of a contract was to turn simply upon the language of the contract itself; that you would not be at liberty, as of course in English law you would not be at liberty, to look at all these letters and this correspondence. They would all be completely and absolutely excluded, and we should have to try to derive what



knowledge we could of the intention of the parties (which is the aim of all construction) from the contract itself, together with any custom which might be supposed to form the basis of the contract. But Oppenheim lays down as a rule in international law, and it seems an extremely good rule, that after all, international tribunals, in dealing with such documents, must first consider: How have the parties interpreted the contract? Because a great Tribunal like this is free, as I have already said, from many of the technical rules that hamper judicial bodies under national laws; and that certainly is an equitable and sound rule. No matter what the contract says, under a technical construction if the parties have agreed and themselves stated what it is to be taken to mean, that is to be its meaning."

Both the quotation from Oppenheim and the observations of the Attorney-General seems to be very apposite to the interpretation placed upon this treaty by the parties, to which I have devoted so long a period of explanation and exposition during the past two days. There is a very sound basis for the rule. There is this defect in all human reasoning: that no human reasoner has ever collected, or can ever collect in his premises, all the facts which may go to form the basis of a just logical deduction. It is impossible for us, at a distance of almost a century, to reproduce for ourselves all those conditions and circumstances which the people of the period when the treaty was made and of the generation which followed, felt, knew without finding them stated in documents or expressed in terms. We might, looking at the language of a treaty with our knowledge, interpreting the words in the light of what we know, come to one conclusion; but our knowledge is necessarily imperfect. We cannot completely put ourselves in the position of the earlier time; and the interpretation which was put upon this treaty at the time when it was made, and for many years succeeding, is the product of a knowledge more complete than ours can possibly be; and the absence of one single word in any document or conversation during all that period which points to the existence of an idea in the minds of the parties that Great Britain was to say what limitations and modifications there might be, or should be, upon our right, is, in the view of this rule presented by the Attorney-General, of the greatest cogency.

There is another subject to which I must briefly call the attention of the Tribunal. Other nations have granted rights having the same generic qualities and characteristics as the right which we have here under consideration. Other nations have had their questions regarding them, have discussed them, have reached conclusions, and have fallen into a course of settled practice regarding them. Other publicists have reasoned about them, have examined them, analysed them, considered their nature, the legal effect and rules of construction which are to be applied; and the results of these processes have been

to give in the international law of the past two centuries a wide field of accepted rules, following upon thorough consideration. We cannot ignore this; but it is not my purpose to weary the Tribunal by going over the subject which was so learnedly and clearly presented by Senator Turner. The Tribunal has the authorities which he presented, the exposition of the international law relating to rights belonging to this class, and I shall not trouble the members of the Tribunal further with them. Yet I cannot ignore it, because the Tribunal cannot ignore it. A great international Tribunal owes a duty not merely to the parties, but, if we are ever to have a system of international law which justifies the existence of a great Permanent Court, a Tribunal like this owes a duty to mankind, a duty to the nations, in reaching such a conclusion regarding such a matter as is presented here as shall tend not to break down, to disintegrate, but to build up, to perfect, to strengthen a system of settled and accepted rules which shall furnish a guide to such a Permanent Court in applying principles and rules of law to the peaceful settlement of international disputes.

So I do not feel at liberty to pass the subject by, to close my discussion of the first question submitted, without making some observations regarding the application of the conclusions reached and the evidence presented by the writers who are cited by Senator Turner, and the relation of those conclusions to the evidence and the question which is here.

The effect of a rule of international law, if such a rule there be, which may be relevant in any degree to the consideration of a treaty between two independent nations is rather that of a rule of construction than of a statute upon which rights are based. Again I am indebted to the learned Attorney-General for the very just exposition of that relation. He says [p. 1073 *supra*]:—

“Of course in dealing with international law in relation to treaties,—a subject with which I have already dealt at such length,—I admitted that international law, when well established and clearly proved, like municipal law, may be taken as the basis of a contract, and may be read into a contract on those matters as to which the contract is silent because, no doubt, the parties were contracting with knowledge of the law.”

In that statement, with which I fully agree, my learned friend demolishes with one blow the ingenious and subtle argument which he had made upon Question 1 in regard to the futility of the United States undertaking to base any claim of right here against Great Britain upon a rule of international law. The argument had been

that international law can be established only by proof of custom; that a servitude can be established only by proof of a convention; and that therefore it is impossible that a servi-



tude, necessarily based upon convention, can be maintained by proof of international law. He has stated the right view, in the observation which I have cited. The bearing of whatever there is in this wide field of consideration and exposition by the publicist who have dealt with international law, upon the question before this Tribunal, is that it affords a guide to the construction of the instrument, to the interpretation of the instrument. Indeed, it is an inversion of the truth to suppose that rights such as we are presenting here are based upon rules of international law. They are based upon the treaty. It is an inversion to suppose that all these gentlemen who have written about servitudes are establishing a basis for servitudes by their references to the analogy of the civil law, of the Roman law. The process is precisely the contrary. In international law, as in the customary law of municipalities, the internal private law of states, a right is discerned; men by contract, or nations by treaties, create a right; natural and necessary consequences are seen to flow from that right; and in international law a series of consequences flowing from the creation of a particular class of rights have been explained by publicists by a reference to the analogy of servitudes under the Roman law. The rights are not made to depend upon the analogy; they are explained by the analogy. That is all that an analogy can ever do—to elucidate, make clear, carry home to the mind, the true nature of the subject to which the analogy is applied. We are not here, and we never have been here claiming that we are entitled to have our treaty right here held inviolable because it is a right founded upon an analogy to the Roman law of servitudes. We are here saying that this is a right which may be understood under a treaty which must be interpreted in the light of the explanations of this and similar rights during a long series of years, and explanations accepted by the nations of the world, so that they have become a rule of construction for conventions which create similar rights. How are we to find, how are we to prove, in the words of the Attorney-General, what the rule of international law is which is to be applied to the construction of this convention? We are not without an exposition of the method of proof by a very great English judge, and a very great authority in international law. In the case of *The Queen v. Keyn*, so often cited here, in L. R. 2 Exchequer Division, p. 63, Sir Robert Phillimore, in his very able opinion, in which he based his construction of the statutes of Great Britain, and his view of the legal effect of those statutes very largely upon an application of the rules of construction which had been built up in this way by the common consent of nations, cites a number of authorities which are very pertinent to the question as to the way to prove the rule of construction to which the Attorney-General appeals.

He cites Mr. Wheaton as saying:—

“Text writers of authority, showing what is the approved usage of nations, or the general opinion respecting their mutual conduct, with the definitions and modifications introduced by general consent, are placed as the second branch of international law.”

“Lord Mansfield, deciding a case in which ambassadorial privileges were concerned, said that he remembered a case before Lord Talbot, in which he—

“Had declared a clear opinion that the law of nations was to be collected from the practice of different nations and the authority of writers. Accordingly he argued and determined from such instances and the authority of Grotius, Barbeyrac, Bynkershoek, Wiquefort, &c., there being no English writer of eminence upon the subject.”

This deliverance of Lord Mansfield was some years before the making of our treaty, and I believe there was no English writer of eminence on the subject of international law for quite a number of years after the year 1818, although continental treatises upon international law had been translated into English and were available for the use and guidance of England.

THE PRESIDENT: Rutherford was perhaps prior. I think Rutherford was in the eighteenth century.

SENATOR ROOT: I do not remember his date.

THE PRESIDENT: I am not quite sure, but I think he would have been prior; but he was, perhaps, the only one.

SENATOR ROOT: That might have been; yes.

Sir Robert Phillimore cites Chancellor Kent as saying:—

“In cases where the principal jurists agree the presumption will be very greatly in favour of the solidity of their maxims, and no civilized nation that does not arrogantly set all ordinary law and justice at defiance will venture to disregard the uniform sense of the established writers of international law.”

1284 He cites von Holtzendorf as saying—

“that the usage and practice of international law is in great measure founded upon the tardy recognition of principles which have been long before taught and recommended by the voice of the wise and discerning men, and that thus the fabric of international jurisprudence has been built up.”

He says himself (Sir Robert Phillimore) that:—

“Of course the value of these *responsa prudentum* is affected by various circumstances; for instance, the period at which the particular work was written, the general reputation of the writer, the reception which his work has met with from the authorities of civilized states, are circumstances, which, though in no case rendering his opinion a substitute of reason, may enhance or derogate from the consideration due to it.”

We have produced here a very great array of evidence as to the existence of an accepted custom among the nations of the earth to



consider rights of the kind conferred in this treaty as constituting a special class with certain special incidents. I am not concerned now with the processes of reasoning by which these writers reached the conclusion. I am not concerned with the name that they gave to the right. I should agree with the Attorney-General that it is an unfortunate name, because it seems to connote a condition of inferiority on the part of one to another, which is rather repulsive to the proud spirit of an independent nation. What I am concerned with, and what I wish to impress upon the Tribunal, is that there is, by approved evidence of a great array of the recognised and most highly respected authorities, and has been since long before the treaty of 1818 was made, a rule among the nations of the earth to treat this kind of right as having certain special incidents—incidents derived from the nature of the right, the nature of the parties to the right, the necessities of the continued existence of the right; therefore the necessities of effectuating the grant of the right. Whether it be that the conclusion was reached by a process which treated the right as real; whether by a process which treated it as obligatory—I am not concerned with that. I do maintain that, giving full effect to such rights, giving them the full effect of perpetuity, it is necessary to treat them as real rights. But the existence of the rule does not depend upon that; nor does the existence of the rule depend upon a transfer of sovereignty. The essential features of the right which is the subject-matter of the rule here are that it shall, in favour of one independent nation, limit the sovereignty of another independent nation in respect of the use of its territory. The majority of writers consider that it must be perpetual; some consider that it need not be. We are not concerned with that, here, because this is perpetual, and there are none who place a right which has the basis of perpetuity below a right which has but a temporary continuance. I say that the essential features, and the only essential features of a right which have been universally accepted by the nations as constituting a special class of rights, with certain special incidents, are the features that exist here: That one nation conveys or assures by conventional stipulation to another independent nation the right to make a use for its own benefit or the benefit of its citizens, of the territory of the first nation, limiting the sovereignty—and I care not whether it be power or rightful exercise—limiting the scope of sovereignty of the nation that has conferred the right. I conceive, and humbly submit to the Tribunal, that it would be a very great misfortune, not merely to the interests of these litigants here, both of whom are deeply concerned in having a consistent system of international law maintained and built up, but a very great misfortune to the world if a conclusion were to be reached here which ignores, which sets at naught, which

rejects the almost universal testimony of the approved witnesses as to the existence of rules of international law. It would be a misfortune if the judgment here should disappoint the just expectations with which the civilized world looks to the decision of a great international tribunal engaged in that administration of justice which should always be not merely a disposal of the rights of the litigants, but a constructive force in the building up of a system to assure justice in future times and in future disputes between nations.

We cannot shuffle off the relation of the rule to which I have referred to the construction of this instrument by treating the great founders and expounders of international law as freaks in a museum of antiquities.

I have said that the essential quality of this special class of rights, granted by convention between two independent nations, and having a perpetual quality in the right granted, is the restriction of sovereignty. Let me give a few of the brief expressions of that idea by the witnesses whom we have called.

Bluntschli says:—

“The name of international servitudes is given to every conventional and perpetual restriction affecting the territorial sovereignty of a State in favor of another State.”

1285 Bonfils says:—

“The servitudes called *conventional* alone constitute veritable restrictions upon the free exercise of internal sovereignty for the benefit of other States.”

I beg the Tribunal, while I read these expressions, to receive them free from any prejudice arising from the fact that these gentlemen used the term “international servitudes.” They are merely using a name which they have chosen to apply to a special class of rights, and under which some of them group other characteristics and some do not. This is the one essential characteristic, and the all-sufficient characteristic:

Calvo says:

“International servitudes are every restriction confining the territorial sovereignty of a State in favor of another State.”

Chrétien:—

“A State may have renounced for the benefit of one or several others the exercise of a right conferred by its sovereignty. . . . If this is permanent an international servitude results.”

Clauss:—

“State servitudes are permanent limitations of territorial sovereignty of one State in regard to another State, created by special agreements or by possession from time immemorial.”



Despagnet:—

"These (international servitudes) consist essentially in a limitation affecting the internal or external sovereignty of a State, which is constrained not to do, or to allow another State to do for its benefit, that which it could normally accomplish or prevent."

Diena:—

"A State obligates itself . . . . to allow another State to perform certain acts on its own territory which it might prevent, or else it obligates itself to abstain from doing certain acts which it would have a right to perform; such restrictions, *when they are of a permanent character*, give rise to the so-called international servitudes."

Fabre:—

"From a juridical point of view it matters little whether the servitudes burden the State or the territory; they are all real rights, those burdening the State effecting a diminution of ruling and juridical right, and those burden the territory effecting a diminution of the right of exclusive use over the territory."

Fiore—

"An international servitude consists in a territorial right constituted in favor of one State upon the territory of another State."

Hall:—

"Servitudes are 'derogations from the full enforcement of sovereignty over parts of the national territory.'"

Hartmann:—

"If the territorial sovereignty of a State is so permanently limited for the benefit of another State that the international personality of the limited State is not destroyed, there arises an international servitude."

Heffter:

"The servitudes here discussed have for their exclusive object sovereign rights or royal prerogatives and generally the public domain. . . ."

"The effects of public servitudes consist sometimes in investing a foreign State with the enjoyment of certain sovereign rights within a territory; at other times in forbidding it the exercise of a like right upon its own territory."

Heilborn:—

"International *jura in re aliena* exist when one nation has a right to require all other nations to refrain from certain acts on foreign territory."

Hollatz:—

"State servitude is a real limitation of foreign territorial sovereignty."

Holtzendorff:—

"An international servitude exists when the rights of territorial sovereignty of a sovereign nation are permanently restricted in favor of one or more other nations so that otherwise permissible acts of governmental control . . . . become impermissible within the servient territory, or otherwise impermissible acts of control by a foreign government become permissible."

1286 Klüber:—

"A public servitude is 'a right founded upon a special title which restrains . . . . the liberty of another State.'"

Lomonaco:—

A servitude is a "conventional restriction placed upon the sovereignty of one nation in favor of another."

G. F. de Martens:—

A servitude of public international law is "a perfect right within the territory of another by virtue of which the latter obligates itself to do, to tolerate, or to refrain from doing for the advantage of the other State, that which it would not naturally be bound to do, and which it cannot ask in return."

Neumann:—

"State servitudes are limitations of the sovereign rights of a State. . . . It is immaterial whether the State is directly entitled as such, or whether it possesses the right on behalf of its subjects."

H. B. Oppenheim:—

"All international servitudes are determined and well-defined restrictions of territorial sovereignty."

L. Oppenheim:—

"State servitudes are those exceptional and conventional restrictions on the territorial supremacy of a State by which a part or a whole of its territory is in a limited way made to perpetually serve a certain purpose or interest of another State."

Phillimore:—

"A State may *voluntarily* subject herself to obligations in favor of another State, both with respect to persons and things which would not *naturally* be binding upon her. These are '*servitudes juris gentium voluntarial*.'"

"The servitudes *juris gentium* must, however, be almost always the result either of certain prescriptive customs or of positive conventions."

Rivier:—

"International servitudes are relations of State to State. . . . as a real right burdening the territory of a State for the benefit of . . . . another State, the international servitude passes with the ter-



ritory. . . . . The servitude is a permanent restriction of territorial sovereignty and not of independence in general."

Ullmann:—

"International servitudes can only be established between independent nations and constitute a restriction of the territorial sovereignty of the servient nation . . . . In substance, international servitudes constitute a tolerance, when the dominant nation is allowed to perform acts of territorial sovereignty, in the territory of the servient nation, by its own authority and independently of the servient nation; or a forbearance, when the servient nation refrains from performing acts of territorial sovereignty on its own territory for the benefit of the dominant nation."

The Tribunal will perceive that the essential quality of the class of rights regarding which all these writers have spoken is the very thing that is here: An independent State limiting its sovereignty, the power or rightful exercise, so as to permit, and permanently permit, another State, itself, or through its citizens, to have the beneficial use of the territory of the State that limits its sovereignty.

It is with regard to the situation thus created that a rule has grown up; and I repeat that the rule is independent of any process of reasoning that any of these gentlemen go through in explaining it. It is there. It is the custom of nations. It has the consent of nations, by unimpeachable and overwhelming evidence, and must be applied to the construction of this treaty, which confessedly creates just such a right as the rule applies to.

Since long before this treaty was made, the accepted rule of international law has been that the kind of right, or the class of rights which I have been discussing, unlike general trading, and travel, and residence rights, the class of rights which constitute a permanent burden in favour of one State upon the territory of another, protected by a limitation of the sovereignty of the burdened State, protected by a solemn conventional limitation keeping away from the right the exercise of that sovereignty, protected by a stipulation which protects the right that constitutes the burden from the exercise of the sovereignty, are not subject to the unrestrained exercise of that sovereignty, are not subject to that exercise of its discretion resting in its own will, which is the necessary incident of all sovereignty, and which is claimed here.

1287 Artopæus, in 1689, speaking of this kind of right, says:—

"The general principles are the following: The servient territory shall not hamper the dominant one in the exercise of the servitude, or lessen the right by various dispositions."

That was 129 years before this treaty of 1818 was made. He proceeds:—

"The right created by the servitude shall not be extended beyond the compass explicitly granted; this does not impede the dominant

party from taking the measures necessary for the exercise of its right. For when a certain right is granted, the measures necessary for its exercise must also be given."

I would rather put here a different use of words, because I sympathise with the Attorney-General's antipathy to the use of the word "servitude." I would rather say: "The sovereign of the burdened territory shall not hamper the possessor of the right that constitutes the burden in the exercise of that right, or lessen the right by various dispositions."

There is no doubt about what it means. There is no doubt but that it applies directly to the right which, a hundred and odd years after, these gentlemen made in the treaty of 1818.

In 1749 Wolf, who I need not tell this Tribunal was one of the great founders of modern international law, accepted as the highest authority, one of those few men whose work in an inconspicuous field, without any of the glamour of those bloody controversies which characterised the day in which he lived, survives the generations and the centuries in the judgment of men whose estimate is worth having—Wolf says, of the nation which has the kind of right we confessedly have here:—

"Since anybody can grant any right he chooses to a third party concerning his thing, so has each nation a right to grant another nation a certain right in its territory. . . . It belongs even to the mutual duties of nations for the one to create certain rights in his territory for the advantage of the other, in so far as no abuse of the territory takes place. Examples of such rights are the following: Fishing rights in foreign rivers or occupied parts of the sea, rights of fortification on alien soil, right of garrisoning a foreign fortified place, jurisdiction in certain localities of a foreign territory or for certain legal actions or over certain persons, &c. The constitution of rights in foreign territories is not of interest to neighboring nations alone, but also to those living at a distance . . . for the exercise of his right is absolutely independent of the will of the sovereign of the territory, he not being subject to the laws of the land with regard to acts connected with the exercise of his right; but as to other acts cannot be regarded otherwise than as a foreigner residing in a foreign territory."

There is great authority, not expressing his own opinion, but stating what the law of nations was seventy years before this treaty was made—authority of the highest character, stating what the law of nations was in regard to the grant of precisely such a right as we have here.

The great Vattel, in 1758, just five years before the treaty of 1763 assured to France that her subjects should have the liberty to take fish on the shore of Newfoundland, and just sixty years before the Treaty of 1818 was made, says:—

"There exists no reason why a nation, or a sovereign, if authorized by the laws, may not grant various privileges in their territories



to another nation, or to foreigners in general, since everyone may dispose of his own property as he thinks fit. Thus, several sovereigns in the Indies have granted to the trading nations of Europe the privilege of having factories, ports, and even fortresses and garrisons in certain places within their dominions. We may in the same manner grant the right of fishing in a river, or on the coast, that of hunting in the forests, &c., and, when once these rights have been validly ceded, they constitute a part of the possessions of him who has acquired them, and ought to be respected in the same manner as his former possessions."

To come to later witnesses, and without wearying the Tribunal by going all through the long list—witnesses not telling what the law is at the time they write, but telling what the law long has been—I will testify to my confidence in the accuracy of Mr. Clauss. He says, after describing what he calls the servitude, what I have been calling a burden, in the words which I have already cited:—

"From this it follows that the entitled State cannot be hindered in the exercise of the authority belonging to it, or even have such exercise rendered difficult for it by certain measures; just as, on the other hand, it is also the duty of the entitled State not to go beyond the rights granted to it. Within the limits created by treaty, however, the dominant State is entirely free and independent of the sovereignty of the servient State. The legislation of the servient State must yield to the servitude right of the foreign State."

That is not Mr. Clauss's opinion about what ought to be; that is the evidence of one of the best, if not the best, and most approved statements of recent time regarding what the law of nations has been and is.

1288 Klüber says:—

"It is likewise essential that the State to which the right belongs shall be, as to its exercise, independent of the State burdened with the servitude."

Heilborn cites as being correct the words of Clauss which I have just read.

I will not multiply these citations, they are to be found in the copious extracts presented by Mr. Turner. I select them from different periods, from most approved writers, showing illustrations of the testimony regarding the nature of this rule, and I care not whether you say that this is a real right or an obligatory right, it is proved beyond peradventure that the nations have confirmed by usage, and regard as a matter of rule, that this kind of right is a right which in limiting sovereignty excludes the sovereignty of the burdened State from diminishing, modifying, or restricting the right that constitutes the burden.

JUDGE GRAY: You do not depend on that, Mr. Root, do you, for the contention that there was no right to modify or limit? It does not depend upon its classification as a technical servitude?

SENATOR ROOT: Certainly not.

JUDGE GRAY: You do not suppose Lord Salisbury had that in mind, or that any of the negotiators (unless Mr. Gallatin, who alluded to a servitude) had in mind any relation to this definition by the writers up to that time?

SENATOR ROOT: I suppose the negotiators understood the way in which rights of that character were generally regarded. I suppose that the testimony of these writers whom I have been reading shows what the general view of nations was before 1818, and I suppose the trained diplomats of Great Britain and of the United States who were there, participated in that general view regarding those rights. I do not suppose that they considered that they were acting under a technical rule of servitudes. But I am citing the evidence which sustains this view of this particular kind of right; first, because it confirms the reasoning which has been presented to the Tribunal through the poor efforts of counsel for the United States, by similar reasoning, reaching similar conclusions, on the part of many of the greatest, the ablest, and the wisest of mankind; and, second, because it is evidence that the nations before the treaty was made took the same view of these rights that we are taking now. I am not basing our position upon any technical rule of servitudes, but supporting it by the evidence that similar conclusions had been reached by wiser and abler men than we at this bar, and that those conclusions had entered into the way of regarding this kind of right on the part of the nations of the earth.

This particular specific kind of right which these gentlemen call "economic servitudes" has been recognised as constituting a class by itself, so freely, so generally, that I submit the Tribunal cannot ignore the fact that it is a class by itself, and a class which has the incident that I have been contending for.

I say we produce evidence that the conclusion which we have been urging upon the Tribunal, whether on the basis of real right, or on the basis of the limitation created by an obligatory stipulation—the conclusions we have been urging upon you, have been reached by substantially all the writers upon International Law, and accepted by the nations of the earth, and constitute a rule of construction to be applied to this treaty, powerfully supporting our reasoning, and making it impossible to ignore that, because of the insignificance and incompetency of the men who presented it.

That these rights which are called "economic servitudes," and which I should prefer to call burdens upon the territory of one State for the benefit of the inhabitants or citizens of another, constitute a class by themselves, appears in the writings which we have presented, and from Vattel, Chrétien, Despagnet, Diena, Fabre, Fiore, Hartmann, Heffter, Hollatz, Rivier, Ullmann, Wharton,



Wolff, Wilson and Tucker, Holtzendorff, Merignhac, Olivart, Oppenheim and Pradier-Fodéré.

Now, they support us, they have reached the same conclusions we have, and they testify that the nations, whose consent makes international law, have accepted the conclusion, however reached, by whatever process of reasoning, the conclusion that such a right as this is a thing by itself, and, from the necessity of its existence, independent of the kind of control which Great Britain claims to read into this treaty as a matter of implication.

And I submit that our reasoning cannot be rejected without at the same time rejecting the general opinion of the world of international law.

1289 I should modify that—it is not our reasoning, but our conclusion that cannot be rejected, without respecting the opinion of the world of international law which has reached that same conclusion, by various routes and on various grounds, but all coming to the same conclusion, accepted and confirmed by usage.

These very rights regarding which we have been arguing (the French and American fishing rights on the Newfoundland coast) have generally been regarded, have been specified, as examples of the class of right standing by itself, protected from the exercise of the sovereign power of the burdened State, and that use of them as examples is found in Bonfils, Chrétien, Clauss, Despagnet, Diena, Fabre, Hollatz, Holtzendorff, Merignhac, Olivart, Oppenheim, Rivier, Ullmann, Wharton, and some others, I dare say, but those I have noted.

Now, if it is possible for anyone to support argument by authority, if it is possible for anyone to give dignity and consideration to the process of his own reasoning, by showing that others have reached the same conclusion, we certainly have given substance, and weight, and authority to the conclusion which we have been deducing here from the record and from the nature of this grant.

There is one matter to which I must call attention before leaving this subject. Counsel for Great Britain have cited a number of decisions in the United States in regard to the exercise of rights of fishing by the people of one State in the territory of another, and some cases in the British colonies. I shall not detain you by any extended consideration of those cases. In the British colonies they were a matter of the internal polity of the British Empire. All these laws had to receive the approval of the Sovereign, they became laws by the authority of the sovereign law, and present purely a matter of internal polity. These laws, statutes, and cases in the United States also are entirely a matter of internal polity, the internal distribution of power within our own country, and can have no relation whatever to an international question of this description.

There was, however, one case which was referred to as indicating that the courts of the United States took a rather inconsistent position with regard to the rights conferred upon an Indian tribe by what we call a treaty. That comes pretty nearly being a matter of internal polity, for our Indian tribes are rather dependent sovereigns; nevertheless, the case is worthy of attention because it involves a charge of inconsistency.

It was the case of the United States against the Alaska Packers' Association, 79 Federal Reporter. That case decided against certain rights which were secured to Indians by treaty, to be exercised in common with the citizens of Washington territory generally, upon the north-western coast. The case was decided upon the authority of certain previous decisions, and the Judge who wrote the opinion says, "I have given the same interpretation to similar treaties with other tribes of Indians in Washington territory," citing United States against James G. Swan, 50 Federal Reporter, and United States against Winans, 73 Federal Reporter, p. 72, and he says up to the present time these decisions have not been reversed.

They have now been reversed by the Supreme Court of the United States in the case of the United States *v.* Winans. That is the case which is mentioned there as decided by the same Judge, and followed by him in his decision.

The case is reported in 198 United States Reports, p. 371, and was decided at the October term, 1904. I cannot ask anything better from the Tribunal than the decision of this case would lead to inevitably. The syllabus begins:—

"This court will construe a treaty with Indians as they understood it and as justice and reason demand.

"The right of taking fish at all usual and accustomed places in common with the citizens of the Territory of Washington and the right of erecting temporary buildings for curing them, reserved to the Yakima Indians in the treaty of 1859, was not a grant of right to the Indians but a reservation by the Indians of the rights already possessed and not granted away by them. The rights so reserved imposed a servitude on the entire land relinquished to the United States under the treaty and which, as was intended to be, was continuing against the United States and its grantees as well as against the State and its grantees."

And accordingly upon that ground they reversed the decision cited by my learned friend on the other side.

The Court says (p. 379):—

"The pivot of the controversy is the construction of the second paragraph. Respondents contend that the words 'the right of taking fish at all usual and accustomed places *in common* with the citizens of the Territory' confer only such rights as a white man would have under the conditions of ownership of the lands bordering on the river, and under the laws of the State, and, such being



the rights conferred, the respondents further contend that they have the power to exclude the Indians from the river by reason of such ownership."

and upon that proposition the Court says (p. 381):—

"The reservations were in large areas of territory and the negotiations were with the tribe. They reserved rights, however, to every individual Indian, as though named therein. They imposed a servitude upon every piece of land as though described therein. There was an exclusive right of fishing reserved within certain boundaries. There was a right outside of those boundaries reserved 'in common with citizens of the Territory.' As a mere right, it was not exclusive in the Indians. Citizens might share it, but the Indians were secured in its enjoyment by a special provision of means for its exercise. They were given 'the right of taking fish at all usual and accustomed places,' and the right 'of erecting temporary buildings for curing them.' The contingency of the future ownership of the lands, therefore, was foreseen and provided for—in other words, the Indians were given a right in the land—the right of crossing it to the river—the right to occupy it to the extent and for the purpose mentioned. No other conclusion would give effect to the treaty. And the right was intended to be continuing against the United States and its grantees as well as against the State and its grantees."

A question was asked during the discussion upon the French treaty rights, as to what references there were in the correspondence, and Mr. Turner said that an examination would be made.

We have made such examination as was practicable, although under great difficulty, the only papers accessible to us being two or three French Yellow Books, and the British Blue Books. There were no such publications covering the early history of transactions between Great Britain and France, and the French Yellow Books began in the sixties. There are only three. We have them here. We have printed some extracts from them which we will hand to our friends on the other side, and hand up to the Court.<sup>a</sup> There is one extract here from the British Blue Book which Mr. Turner read in Court, and which we have reproduced here for your convenience.

They serve, taken together with the correspondence which is already in the record, particularly the correspondence between Lord Salisbury and M. Waddington, to exhibit in a very clear light the attitudes of the two countries in respect of these rights, and I think they show the relative attitudes of the two countries, not only at the precise time when the letters were written, but historically; they show what it had been from the beginning; and without detaining you to read these letters, I will hand them in, with your permission.

Now, I wish to say a word about the practical application of the American view of the right conferred upon us by this treaty, and of the way in which the line should be drawn.

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<sup>a</sup> Appendix (K), *infra*, p. 1422.

Our view is, I need hardly say, that the terms of the treaty itself, which give to the inhabitants of the United States the liberty to take fish of every kind, and reserve no right on the part of the sovereign, whose sovereignty is limited, to prohibit taking at such time as the United States chooses, or in such manner as it chooses, furnished the line which is to be drawn, with the entire field of general sovereignty open and covered by Great Britain. We say that in either view, either the view of a real right, or the view of a binding obligation, when Great Britain comes to the subject-matter of the right, she must stop; that furnishes the line. When she comes to the subject-matter of the right, she is prohibited by her contract, by her grant to us (and it is a part of the limitation of her sovereignty) that she must not say this right shall not cover the taking of fish except at such time as she thinks desirable, or it shall not cover the taking of fish except in such manner as she thinks desirable. If she does think it is desirable to restrict and modify the exercise of that right, because it is a right that she has given to us, she must say to us it is desirable, and we must agree upon the limitations upon our right. It is our view that this furnishes a practicable, convenient, equitable and beneficent guide for the conduct of this business hereafter by the two nations. That if we cannot agree, then under article 4 either party can appeal to the Tribunal which is constituted under this new treaty, or under article 4 either party can appeal to the method which I hope your Honours may be able to prescribe to the satisfaction of both parties for perhaps a simpler and less expensive proceeding. And, from this point of view, I want to repeat what I said the other day, bearing upon our view, that the best thing for all parties is to have a definite line, the definite line that the treaty itself establishes, instead of reading into the treaty this perfectly vague and indefinite idea that Great Britain can go just as far as she thinks reasonable, just as far as Newfoundland thinks reasonable, which is no line at all; which would put always upon Great Britain the necessity of either assenting to the always extreme position

1291 that Newfoundland must take, which the conditions, the nature of things, the fact that they are burdened, the fact that we are their competitor, would compel them to take; or of overruling Newfoundland without any definite line of right on which to overrule her, and of course creating resentment and trouble.

It is better for all parties, as a practical matter, to have a clear line drawn, so that the position of Great Britain will be one of a relation to her colony upon a line of right, instead of a most invidious and difficult position of being compelled to be a Judge deciding for or against her own child in a matter of uncontrolled discretion.

I want to submit to you that the history of our relations with Great Britain indicates that there will not be any trouble about



agreement. There may be some specific and definite question that we will have to leave out to somebody, that we will have to get an opinion upon, but rather for the purpose of backing us up in making an agreement than for any other reason. There is no reason why, if we had this line of right settled, we should not take up the subject of general regulations just where Lord Bathurst and Mr. Adams left off. When Lord Bathurst proposed and our Government accepted the proposition that there should be joint regulations it was, as you will remember, pushed aside by the alternative of pushing us aside to the wild and unsettled coast, where there was not any real use of going on with the subject of joint regulations. There is no reason why we should not take it up, but for this difficulty of Great Britain in dealing with a colony that is sure to be extreme, without having any definite line of right upon which to deal with it.

That there is no obstacle to regulations if both parties know what they are entitled to is quite clear from the way in which countries about this sea live under the joint regulations of the North Sea Fishery. There is no reason why this should not be done as well as Great Britain and France, for so many years bitter enemies, have been able to make their regulations under the treaty of 1839, to make joint regulations in so far as they were concerned between each other under the treaty of 1857, which contained an elaborate scheme of joint regulation for the Newfoundland coast, but which was rejected by Newfoundland, and as at last they have done under their treaty of 1904, which was finally accepted by Newfoundland.

You will remember that in 1889 Lord Knutsford wrote to Governor O'Brien, of Newfoundland, when the colony had been particularly insistent upon its very extreme views of its own rights and convenience:—

“There is no reasonable ground on which the Government of Newfoundland can object to the introduction into that colony of Regulations similar to those which the Governments interested in the North Sea fisheries have agreed upon as best calculated to insure proper police and to prevent the occurrence of disputes among rival fishermen.”

That is dated the 31st May, 1889, and is found in the United States Counter-Case Appendix, p. 325. He says that there is no reasonable ground. The only obstacle lies in the fact that Great Britain has no measure of control over Newfoundland except her own will, and Newfoundland would naturally resent any restraint on what she believes to be necessary for her prosperity at the mere uncontrolled will of the mother country. If you give a clear, definite line of right, such as we are contending for, all that difficulty is obviated.

There would be no trouble with the United States. We have here, and I have already referred to it, an Act of the Congress of the

United States, passed on the 15th March, 1862, and presented in the British Case Appendix, at p. 787, authorising the appointment by the President of a representative of the United States to take part in a joint commission with France and Great Britain for the regulation of the fisheries. I think that it probably referred to the outside bank fisheries, but my purpose in referring to it now is to show the spirit and the ease with which such a matter can be arranged if people know what their rights are. The practical adaptation is comparatively simple. The Chamberlain-Bayard treaty of 1888 contains a series of agreed regulations regarding the enforcement of Canadian laws and regulations for the preservation of their fishery. That treaty failed of confirmation not because of these features at all, but because of other features, and the treaty illustrates how easy it is for two friendly nations, who are familiar with the case and adopt a moderate attitude with respect to international intercourse, to get on with each other, make modalities, and agree upon the best way for the industry to be profitably pursued, provided that they are allowed to.

A very good illustration of what I am now saying is to be found in the history of the so-called *modus* of 1888. Somebody spoke of it here the other day as being still in force in Canada. Well, it was an informal agreement dealing with a lot of these subjects 1292 that we are agonising about here, binding for only two years.

Twenty years ago its binding force ended. The two countries have gone on under it ever since because common sense ruled them, and under it each country finds that its interests are better served by the friendly intercourse that it provides than they would be by breaking up again and going to quarrelling. The debates upon it in the Canadian Parliament—active and exciting debates—have developed argument as to whether it should continue, but the common sense of Canada has prevailed. Canada has become a nation with a sense of national responsibility, of a national future, and of the value and importance of commercial relations, and it is her own will that she continues this, and she is not concerned by any narrow and limited view of the people of a particular locality.

SIR CHARLES FITZPATRICK: And it is practically not her only industry.

SENATOR ROOT: Well, it is not; that is true. It is not practically her only industry, and that makes it easier for her. The same thing is illustrated by the way in which we have got on under the *modus vivendi* of 1906 and the *modus* of 1907 regarding this same Newfoundland matter. Sir Edward Grey, the American Secretary of State, the American Ambassador to Great Britain, the British Ambassador to Washington—none of them had any trouble about it except that Newfoundland screamed loudly over Great Britain under-



taking to make an agreement which Newfoundland considered to be overriding her constitutional rights, and it was only because it was a necessity to the prosecution of the idea of having an arbitration that the *modus* was made. It was only because of such a necessity that Great Britain was able to stand up and insist upon it against the violent protests of Newfoundland.

I want to impress upon your minds what Governor MacGregor said about the way in which they got along under those moduses. The Governor made a report to Lord Elgin, to be found on pp. 360 and 361 of the American Counter-Case Appendix. He says:—

“I have had personal interview with Inspector O'Reilly who has arrived from Bay of Islands at St. John's, Newfoundland.”

This is a report on the working of the *modus* of 1906, and is dated the 22nd November, 1906.

“No ill-feeling towards American ships on the part of Newfoundland fishermen, and no interference with American ships.

“About forty American ships, about twenty Canadian ships, about fourteen Newfoundland vessels, Bay of Islands; three vessels loaded, sailed for Gloucester.”

And so on.

“Alexander has been on friendly terms with Newfoundland officers; American ships consult with Alexander on all points raised, and are guided by his careful advice; Alexander understands position, and endeavors to prevent trouble.

“Neither master nor owner American ships offered any opposition to legal proceedings against Dubois and Crane, but rather facilitated matters advised by Alexander.

“Legal proceedings produced no result. There is no excitement; fishermen are at work as if nothing had happened.

“All American ships have entered Customs House and Light Dues have been paid without any trouble.

“American ships have observed in good faith the conditions laid down in *modus vivendi*.

“No trouble expected if matters remain the same as at the present time, but enforcement of Bait Act in general might produce disturbance.”

You can get on all right under an arrangement with Great Britain and the fishermen can get on all right together, but for this disturbing influence for which I cannot blame Newfoundland, because it is quite inevitable. At p. 366 he makes another report, dated the 29th December, 1906. He says:—

“Relations of fishermen on friendly terms.

“There was considerable cutting of fishing nets and gear, principally American ships, against each other, but Newfoundland fishermen have suffered from this.

“*Potomac* did good service Newfoundland fishermen during the ice blockade about the middle of this month in releasing fishing nets

and fishing smacks when blocked by ice; *Potomac* broke the ice for fishermen without distinction (of) nationality."

Captain Anstruther, in his report of the 4th December, 1906 (p. 366), says:—

"The ice was from four to six inches thick and the fishermen were powerless to recover their property. The *Potomac* spent all Saturday and Sunday ice-breaking, which enabled many of the nets 1293 to be recovered, but I fear a large number will be lost. This work, though, of course, beneficial to American fishermen, was also of material assistance to Newfoundland, so I took upon myself to thank Lieutenant Hinds on behalf of the Newfoundland fishermen for his co-operation."

The "*Potomac*" was an American vessel, and I should observe that she was not a man-of-war. There was no man-of-war there. She was there as a white-winged messenger of peace. She was a revenue vessel of the United States sent up to help make the *modus* work, and apparently she did. If you will give us a clear line to work on, Great Britain and the United States will get on all right, and the fishermen of Newfoundland and of the United States will get on all right; but so long as the traders of Newfoundland really believe that the American right is under the uncontrolled control of Great Britain, they will, by the necessity of human nature, insist that Great Britain shall exercise that control to the farthest limit. That brings me to the close of what I have to say regarding Question 1. Is it the wish of the Tribunal that I shall take up another question?

THE PRESIDENT: Do you desire to continue?

SENATOR ROOT: It is hardly worth while unless you are going to sit after 4 o'clock.

THE PRESIDENT: Then, the Court will adjourn until Thursday at 10 o'clock.

[Thereupon, at 3.50 o'clock p. m., the Tribunal adjourned until Thursday, the 11th August, 1910, at 10 o'clock a. m.]

THIRTY-NINTH DAY: THURSDAY, AUGUST 11, 1910.

The Tribunal met at 10 a. m.

THE PRESIDENT: Will you please continue, Mr. Senator Root?

SENATOR ROOT (resuming): I shall ask your further consideration for a time of the fifth Question: "From where must be measured the 'three marine miles of any of the coasts, bays, creeks, or harbours' referred to in the said article." This, of course, is equivalent to calling for a decision as to the scope of the renunciation clause in the first article:—

"And the United States hereby renounce forever any liberty heretofore enjoyed or claimed by the inhabitants thereof to take, dry or



cure fish on or within three marine miles of any of the coasts, bays, creeks or harbors of His Britannic Majesty's dominions in America, not included within the above mentioned limits."

"The above-mentioned limits" were, of course, the limits of what we call the treaty coast, the west coast of Newfoundland, a portion of the south coast of Newfoundland, and the coast of Labrador, and the Magdalen Islands.

The question as to the scope of this renunciation appears to turn upon the meaning to be given to the word "bays."

The inhabitants are not to take, dry, or cure fish on or within 3 marine miles of any of the coasts, bays, creeks, or harbours.

It is not suggested that there can be any question about the meaning or scope to be given to the word "creeks" or to the word "harbours," but the word "bays" is, by our friends on the other side, taken out of the category in which it was placed, and has a meaning ascribed to it making it cover all these great indentations dividing the coasts of New Brunswick, Nova Scotia and Cape Breton, Prince Edward Island, and indenting the shores of New Brunswick, and of Newfoundland.

On the other hand, the United States contend that the "bays" contemplated are the "bays" which are naturally to be classified with creeks and harbours, occurring along the coast, and separating different coasts, different portions of the coasts, and which are to be found along the different coasts of these great indentations. That is to say, that the "bays" referred to there are these smaller bays running off, to be found all along these different coasts. And, that the word had not in the minds of the negotiators, the makers of the treaty, any reference to these great bodies of water.

I should add a statement as to the British contention. It is that the word "bays" is used in a geographical sense, so that all  
1294 these great bays are included, because they were known to the world as "bays," appeared on maps as "bays," and were what everybody knew to be "bays."

The question is not a negligible one, it is serious, and cannot be decided as a matter of first impression by saying that "bays" means "bays." If it could be decided in that way, we should have been spared this long discussion.

The more it has been studied, the more the history of the time and of the negotiation has been studied, the more cause the student has found to question that simple and easy surface disposition of the matter.

That the contention of the United States is entitled to very careful consideration before it is dismissed is made manifest by the fact that the Government of Great Britain once reached the same conclusion which the United States now present to the Tribunal, and stated

the fact that it had reached it in the letter from Lord Stanley to Viscount Falkland of the 19th May, 1845, appearing in the British Case Appendix, pp. 145 and 146.

As that contains an admirable statement of the American side of the case, I beg the liberty of calling your attention to it. Lord Stanley says:—

“My Lord,

“H. M. Govt having frequently had before them the complaints of the Minister of the U. States in this country on account of the capture of vessels belonging to fishermen of the U. States by the provincial cruisers of N. Scotia and N. Brunswick for alleged infractions of the Convention of the 20th Oct 1818 between G. Britain and the U. States, I have to acquaint your Lordship that, after mature deliberation, H. M. Govt deem it advisable for the interests of both countries to relax the strict rule of exclusion exercised by G. Britain over the fishing vessels of the U. States entering the bays of the sea on the B. N. American coasts. H. M. Govt therefore henceforward propose to regard as bays, in the sense of the treaty”:

You will perceive that this letter is upon the subject of the construction, of the meaning of the treaty, not of granting a favour, not of refraining from enforcing the treaty in accordance with its construction, but it relates to a determination upon what the treaty means:—

“H. M. Govt therefore henceforward propose to regard as bays, in the sense of the treaty, only those inlets of the sea which measure from headland to headland at their entrance the double of the distance of 3 miles, within which it will still be prohibited to the fishing vessels of the United States to approach the coast for the purpose of fishing. I transmit to your Lordship herewith the copy of a letter, together with its enclosures, which I have received from the Foreign Office upon this subject, from which you will learn the general views entertained by H. M. Govt as to the expediency of extending to the whole of the coasts of the British possessions in N. America, the same liberality with respect to U. States fishing boats as H. M. Govt. have recently thought fit to apply to the Bay of Fundy; and I have to request that your Lordship would inform me whether you have any objections to offer, on provincial or other grounds, to the proposed relaxation of the construction of the Treaty of 1818 between this country and the U. States.

“I have, &c.

“STANLEY.”

The complaints referred to by the Minister of the United States on account of the capture of vessels belonging to fishermen of the United States by the provincial cruisers of Nova Scotia or New Brunswick are doubtless the complaints relating to the capture of the “Washington” and the “Argus,” which were the only vessels ever captured outside of the 3-mile limit, and which were taken by provincial cruisers, and not by the vessels of Great Britain.



This letter shows that, having brought sharply before it the assertion of Nova Scotia, that the treaty covered by its renunciation clause the great bodies of water geographically known as bays, and being faced with the demand of the United States for reparation for the acts which the United States deemed to be unwarranted and injurious, of seizing the "Argus" and the "Washington," the British Government re-examined the subject; plainly they then discovered, or had already discovered, the error in the former opinion of the law officers of the Crown, who had based an expression of opinion that the renunciation clause of the treaty did cover these "bays" upon the supposed use of the word "headlands" in the treaty. Plainly the Government of Great Britain had discovered that that opinion was built on sand, and the opinion had fallen in the estimation of the Foreign Office; and we have here a statement that the Foreign Office had prepared and communicated to the Colonial Office, at the head of which Lord Stanley was, an examination and exposition of the subject. He says:—

"I transmit to your Lordship herewith a copy of a letter which I have received from the Foreign Office on the subject."

1295 That is to say, having the matter sharply presented by the demand for reparation for the seizure of the "Washington" and the "Argus," the Foreign Office took the subject up in earnest, examined it, found that the opinion of the Law Officers of the Crown, upon which Nova Scotia had been proceeding, was not worth the paper it was written on, because it was based upon an erroneous assumption as to the terms of the treaty, came to the conclusion that the construction which is now contended for by the United States was the correct construction of the treaty, communicated that fact, with the reasons, to the Colonial Office, and the Colonial Office advised the Governor of Nova Scotia in this letter that the Government of Great Britain had determined to regard as bays, in the sense of the treaty, only those inlets of the sea which measure from headland to headland, at their entrance, double the distance of 3 miles.

The Government of Great Britain was driven back from giving effect to that conclusion by the protest that came from Nova Scotia, based upon the interests of the colony.

Nevertheless, we have of record that deliberate, reasoned, matured decision of the Government of Great Britain as to the meaning of the renunciation clause in this treaty.

Motives of policy affecting their colony prevented them from giving effect to their decision, but the decision remains as authority for us in our consideration of the question.

There are two or three other communications from Great Britain which serve to mark the outlines of the subject and define the ques-

tion, which I should be very glad to have you consider—a letter from Lord Kimberley to Lord Lisgar of the 16th February, 1871, p. 636 of the American Appendix.

THE PRESIDENT: The letter from the Minister of Foreign Affairs to Lord Stanley, with its enclosure, has not been published?

SENATOR ROOT: We have not been favoured with that. No; I should like to see it. Of course we have it not, and it is not here.

The knowledge of its existence serves merely the purpose of certifying to us that this conclusion announced by Lord Stanley was a conclusion upon grounds of reason.

The Earl of Kimberley, writing from the Foreign Office to Lord Lisgar in 1871, the time when the making of the new treaty was proposed (Lord Lisgar was Governor-General of Canada), says, reading from the third paragraph on p. 636:—

“As at present advised, Her Majesty’s Government are of opinion that the right of Canada to exclude Americans from fishing in the waters within the limits of three marine miles of the coast, is beyond dispute, and can only be ceded for an adequate consideration.”

Then the third paragraph below:—

“With respect to the question, what is a Bay or Creek, within the meaning of the first Article of the Treaty of 1818, Her Majesty’s Government adhere to the interpretation which they have hitherto maintained of that Article, but they consider that the difference which has arisen with the United States on this point, might be a fit subject for compromise.”

I cite this for two purposes. One is, the terms in which the question is stated; the right of Canada to exclude Americans from fishing in the waters within the limits of *3 marine miles from the coast*, is what is said to be beyond dispute. The question, what is a bay or creek within the meaning of the first article of the treaty, is a matter on which Her Majesty’s Government adhere to the interpretation they hitherto maintained, but they consider it a fair subject for compromise.

Another statement of the question is to be found at p. 629 of the American Appendix, and that is a memorandum made for the Foreign Office, and sent by the Earl of Kimberley, the Minister of Foreign Affairs, to Sir John Young, who was then Governor-General of Canada, on the 10th October, 1870. That is, it was a memorandum made for the Foreign Office, I do not know where, but adopted by the Foreign Office, and transmitted by the Minister of Foreign Affairs to the Governor-General of Canada.

This memorandum recites the convention of 1818, quotes the renunciation clause, and proceeds:—

“The right of Great Britain to exclude American fishermen from waters within three miles of the coast is unambiguous, and it is



believed, uncontested. But there appears to be some doubt what are the waters described as within three miles of bays, creeks, and harbors. When a bay is less than six miles broad, its waters are within the three miles limit, and therefore clearly within the meaning of the Treaty; but when it is more than that breadth, the question arises whether it is a bay of Her Britannic Majesty's Dominions.

1296 "This is a question which has to be considered in each particular case with regard to International Law and usage. When such a bay, etc., is not a bay of Her Majesty's Dominions, the American fishermen will be entitled to fish in it, except within three miles of the 'coast'; 'when it is a bay of Her Majesty's Dominions' they will not be entitled to fish within three miles of it, that is to say, (it is presumed), within three miles of a line drawn from headland to headland."

Both of these communications you will perceive in stating this question use as the test the question: the limit of 3 marine miles of the coast; their description of the territorial zone is of a zone within the limit of 3 marine miles of the coast; as to that there is no question; as to "bays" which may be outside of that limit there is serious doubt.

They use the expression very much as it was used by Lord Aberdeen in a letter to which I will now call your attention, which appears on p. 488 of the American Appendix. It was written to Mr. Everett, the 10th March, 1845, from the Foreign Office. That is the letter in which the British Government relaxed, even before this determination evinced in Lord Stanley's letter of the 19th May, 1845, the application of the rule based upon the Nova Scotian construction of the renunciation clause, and relieved the Bay of Fundy from the application of it. In that letter Lord Aberdeen says, reading from the next to the last paragraph on p. 489:—

"The undersigned has accordingly much pleasure in announcing to Mr. Everett, the determination to which Her Majesty's Government have come to relax in favor of the United States fishermen that right which Great Britain has hitherto exercised, of excluding those fishermen from the British portion of the Bay of Fundy, and they are prepared to direct their colonial authorities to allow henceforward the United States fishermen to pursue their avocations in any part of the Bay of Fundy, provided they do not approach except in the cases specified in the Treaty of 1818, within three miles of the entrance of any bay on the coast of Nova Scotia or New Brunswick."

That is to say, American fishermen may pursue their avocation in any part of the Bay of Fundy provided they do not approach within 3 miles of the entrance of any bay on the coast of Nova Scotia, or on the coast of New Brunswick.

Now, insensibly Lord Aberdeen is using the term there, exactly as we say it was used in the treaty.

My learned friend Mr. Ewart told us that we might substitute for this general distributive use of the word "coasts" on any of the coasts, bays, and so forth—that we might substitute on the coasts of Nova Scotia, and the coasts of New Brunswick, and the coasts of Prince Edward Island, and the coasts of Newfoundland; and that is exactly what Lord Aberdeen does here; and the necessary result is that which you get here in this description by Lord Aberdeen, that the coasts meant in the treaty are the coasts of Nova Scotia, the coasts of New Brunswick, the coasts of Newfoundland, and the bays are the bays of those coasts.

It is the kind of view which one naturally falls into in dealing with a fisherman's subject, looking at the subject from the point of view of the exercise of the fisherman's avocation, as Lord Aberdeen was here, as the treaty-makers were—the fisherman who crawls along the coast, to whom this (indicating on map) is one coast, and that is another, looking at it from the interior point of view, and not the point of view of the great merchant ship that comes sailing across the sea from the coast of Europe, and that looks at the western coast of the ocean as a whole. That is the occasion of this distributive form, and I shall presently show that it had an origin in a still more distributive and separative use of the word.

Now, this question depends, as a matter of reasoning, in the view of the United States, upon this fundamental proposition that the terms of the renunciation clause are to be limited, as a matter of construction, to the matter which was in controversy. As to that I do not understand that there is any dispute. The article recites that—"differences have arisen respecting the liberty, claimed by the United States for the inhabitants thereof, to take, dry, and cure fish on certain coasts, bays, harbours, and creeks."

Therefore, it is agreed, first, that the inhabitants of the United States shall have the liberty to take, dry, and cure fish within certain limits; and next, the United States, for its inhabitants, renounces all the liberty that it has had or claimed upon all coasts not included within the limits. It is a clear cut, compact settlement of the matter in controversy between the parties by one of the parties keeping one part and giving up the other part. We are confined in our construction of the meaning of the words to such meaning as applies to the matter in controversy, and does not carry them outside to other matters. If there are two possible meanings, one which is within and one which is without, we must reject the one which is without and take the meaning that is within the subject-matter.

1297 The second proposition upon which we are fortunately removed from the necessity of long discussion is that the matter in controversy was limited to those waters which were within the territorial jurisdiction, the maritime jurisdiction, the maritime limits,



the limits of British sovereignty, using a variety of expressions which we find in these negotiations and correspondence, all referring to the same thing. The subject-matter in controversy is limited to the exercise of the liberties within the territorial waters of Great Britain. That follows necessarily from a great number of expressions which were used in the negotiations, and which were authoritative statements of the position of Great Britain which the United States had to meet, and which were statements of the subject-matter which was to be settled. An expression of this is to be found in Lord Bathurst's letter of instructions to the Commissioners at Ghent, which appears in this pamphlet, p. 9. He says to the Commissioners, at the foot of the first paragraph:—

“You are instructed to state that the three material points which remain for consideration are the following:”

Then, at the foot of the page:—

“Secondly, the fisheries. You are to state that Great Britain admits the right of the United States to fish on the high seas without the *maritime jurisdiction* of the territorial possessions of Great Britain in North America.”

Then he goes on to say something, which I shall refer to hereafter, regarding the extent of that, and continues:—

“But they cannot agree to renew the privilege, granted in the Treaty of 1783, of allowing the Americans to land and dry their fish on the unsettled shores belonging to his Britannic Majesty.”

etc. As to everything *without the maritime jurisdiction* of the territorial possessions of Great Britain there was no controversy, there was agreement. As to the area of water *within the maritime jurisdiction*, within the limits of British sovereignty, there was controversy, and to that controversy this statement related.

THE PRESIDENT: As to the waters without, there was no controversy; whereas, as to the waters within, there was controversy?

SENATOR ROOT: Precisely.

THE PRESIDENT: How am I to understand that? I should think that if, concerning the waters within, there was controversy, this controversy would extend each way, and would, therefore, also extend to the waters without, because what is not within is without, and what is not without is within.

SENATOR ROOT: You will see that they would be quite different controversies. The controversy to which I refer was a controversy as to whether, within those limits, whatever they were, we had the right to fish or not. We said that within them we had the right to fish because we had it before, that it was granted in 1783 and still continued, notwithstanding the war. Great Britain said: Within those limits you have no right to fish; you have the right outside of them, but within them you have not, because your treaty grant of 1783

is ended by the war. If there were a controversy about where the limits were that would be quite a different controversy, dependent upon facts and different rules of law. All I am addressing myself to now is the proposition that the words of the renunciation clause must be construed as applying solely to the matter which was in controversy then, and that that controversy was solely about the right to be exercised or not exercised within the territorial limits, whatever those limits were, and I am about to proceed to the further proposition that it follows that if we can ascertain what those limits were, the limits of sovereignty, of jurisdiction, the maritime limits, the territorial limits, whatever those varying expressions may be, we have an infallible guide to ascertain the meaning of the word "bays" in this renunciation. We can put a limit to them. We have drawn a line around the field to which it is possible to apply the word "bays" or "harbours" or "creeks." The proposition I am now engaged upon is that the matter in controversy was, in fact, limited to the territorial waters, to the maritime limits, whatever they were, and that that is what the negotiators had in mind when they were settling rights about those particular waters.

1298 Mr. Ewart has been very frank and clear upon that; he regarded it as a step in his own argument. He said [p. 756]:—

"Then I come to one that bulked very largely in Mr. Warren's argument:—That the negotiators understood that they were dealing with waters 'within the maritime jurisdiction of Great Britain,' 'within British sovereignty,' and so on. I had made a collection of excerpts for the purpose of proving that to be true, but my list is not nearly so long or so full as Mr. Warren's, and I therefore do not trouble the Tribunal with it. If, however, there is any way in which I can emphasise what he said, I should like to do so. It seems to me important. It seems to me, Sirs, that when the negotiators went to negotiate about this treaty, even if they had had no instructions at all, they would have known that they were going to deal with waters in British sovereignty. Nor would the British imagine that the Americans were going to renounce parts of the high seas."

Further down he repeats the same proposition.

JUDGE GRAY: I was very much interested in that point of Mr. Ewart's argument. Mr. Ewart further said in that connection, if I recollect his argument, that the treaty is a convention between Great Britain and the United States, and that by the fact of its being a convention it established between them the conventional territoriality of all bays.

SENATOR ROOT: I remember that Mr. Ewart did subsequently—

JUDGE GRAY: He said that it was a conventional establishment of the territoriality of bays. I merely call it to your attention.

SENATOR ROOT: That proposition of Mr. Ewart has the fatal vice of depending entirely on ascribing to the word "bays" his own



meaning—a meaning which is in question here. If the word “bays” in the treaty means what Mr. Ewart says it does, that is true; if it means what we say it does, precisely the contrary result is accomplished. We are now engaged in trying to find what it means, and you must give some other evidence as to what the extent of the territorial jurisdiction was in order to ascertain the meaning of “bays.” You, by assuming a meaning and putting it into the treaty, cannot ascertain the meaning. That is a perfect *petitio principii*.

JUDGE GRAY: The proposition was made by him in connection with Mr. Warren’s argument that, in order that “bays” might be considered territorial—exceptionally so—there must have been some assertion and by the Power claiming them and recognition by some other Powers of their territoriality, and so he said that the convention itself was a recognition of bays. But you contend that that is something of a circle.

SENATOR ROOT: Plainly so. It was a recognition only if you assume, first, the meaning which British counsel give to “bays,” for we have already reached a point now upon this agreement of Mr. Ewart and Mr. Warren which shows that these gentlemen were dealing solely with territorial waters; that the renunciation applied solely to territorial waters; that they had nothing else in mind; that they were not settling anything except in regard to territorial waters. We have already reached a point where you have excluded a geographical bay as a geographical bay. In order to bring “bay” within the meaning of the treaty, you have to regard it as a territorial bay. It must be within the territorial limits of Great Britain. It can not be without, whatever it may be, geographical or otherwise, and whatever any map may say about it. We have reached a point where we know now that these gentlemen were not thinking about a map. Incidentally, I may remark that there is no evidence that they used any map. Mitchell’s map was used in 1783 when they were fixing a boundary between the two countries at the original separation, but there is no evidence that I know of that in 1818 they had any map at all. But we know now that they were not making an agreement with reference to any map; they were making an agreement regarding the disposition of certain waters which were within the territorial jurisdiction of Great Britain, and they were dealing with nothing else. Indeed, that conclusion would follow almost inevitably from the mere words of the renunciation clause. The United States renounced—

“Any liberty . . . to take, dry, or cure fish on or within three marine miles of any of the coasts, bays, creeks, or harbours of His Britannic Majesty’s dominions.”

On or within. That 3 miles is not an arbitrary expression or measurement. It is a reference to the recognised territorial zone.

We must ascribe that force to it. Lord Stowell had already so described it in the "Twee Gebroeders" case, and the treaty of 1299 1806 had already fixed the normal zone at 3 marine miles.

Lord Bathurst, in his instructions to the Ghent Commissioners, had already said that a limit of 3 marine miles must be observed. Then by 1818 all those vague, old claims which nobody was quite sure about and everybody was very insistent upon or against, had disappeared, and they had come down to the 3-mile limit. The zone of jurisdiction which, as a matter of course and without any assertion, is accorded to every country for the protection of its coast, and this "three marine miles" plainly refers to that 3-mile territorial zone. You must suppose that the bays which are talked about here are bays which are within the territorial zone wherever it lies, and the renunciation is of the right to take fish, &c., on coasts, bays, creeks, and harbours that are within this territorial zone. I say that there is a natural conclusion to be drawn from these words perfectly in accord with the conclusion that, by another line of reasoning, another route, Mr. Warren and Mr. Ewart reached—the agreement as to the proposition that the subject-matter in controversy, the matter to which the words "bays, creeks, harbours" apply is the territory within, and not additional to, the territorial limit, the territorial jurisdiction of Great Britain.

THE PRESIDENT: Would it not then have been more natural to have expressed it as you have expressed it just now by putting in the words, "within three marine miles" behind "coasts, bays, creeks and harbours," instead of before? You said, "coasts, bays, creeks or harbours within three marine miles"; would it not have been natural to have expressed it in the treaty in the same way as you now express it in your argument?

SENATOR ROOT: I do not think any more natural than this. I think it is merely a matter of style. It would have involved the use of one more word.

SIR CHARLES FITZPATRICK: Style and meaning.

SENATOR ROOT: I cannot see that there would be any difference in the meaning:—

"The United States hereby renounce, for ever, any liberty heretofore enjoyed or claimed by the inhabitants thereof to take, dry, or cure fish on the coasts, bays, creeks, or harbours of His Britannic Majesty's dominions in America, or within three marine miles thereof"

would be the President's suggestion. That is a very good way to express it, but I think it is merely a question of style as to whether you make an additional clause or incorporate the words in the same line.



THE PRESIDENT: It would certainly express your idea in a clearer way, I should think.

SENATOR ROOT: That would probably result from the fact that the style of the President of the Tribunal is superior.

THE PRESIDENT: I make no pretensions at all as to style.

SENATOR ROOT: Whatever inference is to be drawn here, there is no dispute—and I take it there can be none—that the bays, harbours and creeks referred to were within the territorial limits of Great Britain, and were not something additional to those territorial limits. As I said a few minutes ago, in answer to a question, if we can ascertain what those territorial limits are, we have an infallible guide to show us what bays, harbours and creeks were referred to.

The first proposition which I wish to make in the effort to ascertain what the negotiators understood these limits to be, for, after all, that is the great question—we are not so much concerned about what some arguments might have established them to be as with what the makers of the treaty considered them to be—is that there is now, there was then, and there always has been, ever since the old vague claims to great areas of the sea were dispelled and abandoned, a rule, which is a rule of common sense, almost of necessity, that if any nation wishes to extend its jurisdiction over a bit of water extending beyond the limit of its accepted and accorded territorial zone, it must claim it. It must assert its right. There was not in 1818, and there is not now, any rule of law or any custom of nations under which the large bodies of water indenting the coast of a country are regarded as being within the jurisdiction of the country unless the country asserts her jurisdiction over them, unless the country claims them.

The general rule of law accords to every country a territorial zone over which it has rights of sovereignty based upon the necessity and the reasonableness of protection. The most general view is that the reasonable width of such a zone is 3 miles. Some countries take a

different view, Norway, I think, claiming 4 miles. In the 1300 treaty of 1806, to which I shall have to refer again presently,

Great Britain and the United States agreed upon 3 miles as the width of such a zone as all the world was bound to recognise, and upon 5 miles that they would recognise as between themselves for the peculiar and special circumstances treated of in that treaty. The Institute of International Law, at its meeting in 1894, expressed the view that 6 miles would be reasonable. But the width is immaterial to my present argument. Whatever it be, the world accords to every country, as a matter of course, and without its making any assertion of it, or claim to it, a right of sovereignty over the strip of water which surrounds its coast. It was originally fixed by the distance of cannon-shot, and, of course, fixed by measurement from

the solid land, because you do not take cannon out in the water and fire them off; you shoot them from the land, and the 3 miles, the 4 miles, the 6 miles, whatever it is to be, is a commutation of the old idea of cannon-shot. Great Britain and the United States agreed, as between themselves, that the cannon-shot should be conventionally treated as being 3 miles in length. As the cannon-shot grows longer there is a tendency to increase the width of this zone, for two reasons—because the country can defend itself over a wider zone, and because the country is liable to attack across a wider zone, and therefore it has to keep ships of war farther away. It all comes back to the principle of protection, and, for the purposes of protection without assertion, without claim, as a matter of course, to every country the law of nations accords the right of sovereignty over a strip of water measured from her solid soil. Originally they had this width determined by the competency of cannon, going as far as explosives would send a shot, and more recently measured by an agreed commutation as to the length of cannon-shot—3 miles, 4 miles, 6 miles, whatever it may be.

But there is no such right accorded by the law of nations to any country outside of that zone, whatever its width may be, measured by cannon-shot or a commutation of the length of cannon-shot from the solid land. There is no such sovereignty accorded over any bay, or creek, or inlet, or harbour that does not come within that normal zone, unless the nation has affirmatively elected to take the bay, creek, or harbour into its jurisdiction, and asserted its right to take it into its jurisdiction, upon facts which, when analyzed, will be found always go back to the same doctrine of protection.

The United States had no rights over Delaware Bay unless she elected to appropriate Delaware Bay, as she did. Great Britain had no rights and could have no rights over the Bay of Fundy, over Chaleur, Miramichi, Conception, Placentia, White Bay, unless she elected to appropriate them. The writers say these bays, more than double the width of the territorial zone, may be prescribed for. That is what Stowell says in the "Twee Gebroeders" case. He says an area of sea outside of the limits may be prescribed for. Phillimore says:—

"Besides the right of property and jurisdiction within the limit of cannon-shot from the shore, there are certain portions of the sea which, though they exceed this verge, may, under special circumstances, *be prescribed for*."

The Attorney-General here in his argument says [p. 1103]:—

"If you want to be acknowledged as the possessor of a bay, you must claim it."

Very just.



Chitty speaks of appropriating gulfs and straits, in a quotation my friends have read on the other side.

De Martens speaks, in a quotation read by the British counsel, in these words:—

“A nation may occupy and extend its dominion beyond”  
this recognised limit.

To prescribe for a thing is to claim it upon the ground of possession. We cannot have a better statement of the precise situation than was made by the British negotiators of the treaty of 1806, Lords Holland and Auckland, at p. 61 of the British Appendix. In the second paragraph of their report to the British Foreign Office of the 14th November, 1806, they condense a statement of the law and the existing conditions in the world at that time most admirably. Let me read the first two paragraphs, for they both are apposite. They say:—

“My Lord,

“In elucidation of the subject of our public despatch we beg leave to lay before you the following observations on the nature of the extension of jurisdiction suggested by the American Commissioners, on the real value of such a concession compared with that which they seem to set upon it as well as the reasons which in our opinion induce them to urge it so strenuously.

1301 “The distance of a cannon shot from shore is as far as we have been able to ascertain the general limit of maritime jurisdiction and that distance is for the sake of convenience practically construed into three miles or a league. All independent nations possess such jurisdiction on their coasts; and the right to it is not only generally contained in the acknowledgement of the independence of the United States, but seems to have been specifically alluded to in the 25th article of the treaty of 1794. Particular circumstances resulting from immemorial usage, geographical position or stipulations of treaty have sometimes led to an extension of jurisdiction, and may therefore when applicable, be urged as a justification of such a pretension.”

That is the precise situation in which Great Britain and the United States stood.

THE PRESIDENT: Does this passage refer to bays, or does it refer only to an extension of the distance on the open coast?

SENATOR ROOT: I shall show you, Sir, that it refers to bays. It refers to any extension beyond the 3-mile limit.

THE PRESIDENT: The fourth paragraph in this despatch begins with the words “the space between headlands is more generally laid down, and admitted by Grotius himself, as subject to the exclusive jurisdiction of the power to whom the land belongs.” That is in the fourth paragraph of the same despatch.

SENATOR ROOT: Yes. They go on to discuss the proposition of the Americans, which related to the subject of bays. I will take that up. I intend to return to this letter in a few minutes.

THE PRESIDENT: Yes.

SENATOR ROOT: I was reading this portion only as a statement of what I conceive to be the actual condition of law under which these gentlemen stood at the time they were making this treaty. I shall return to it for another purpose.

Upon attentive consideration of this long and voluminous record I have become satisfied, and I think that the Tribunal must become satisfied, that—

First, Great Britain never, down to the final conclusion of the treaty of 1818, claimed or asserted a right to the extension of her jurisdiction beyond the cannon-shot, and over the waters of any of these bays that exceeded double the cannon-shot distance, or its commuted length of 3 miles. That may be qualified, and as to that I shall say something particularly, but my general statement should be qualified by a reference to the fact that it may be that there were certain municipal statutes which related to Chaleur and Miramichi that are open to discussion as to whether they did not amount to an assertion of jurisdiction. It is claimed by Great Britain that they did amount to an assertion of jurisdiction. We say they did not. But as to all these others, laying aside Chaleur and Miramichi, to which these municipal statutes related—as to all these others, Fundy, St. George, Fortune, Placentia, Notre Dame, White—as to all of them, so far as I can ascertain upon the most painstaking examination, there never was an election by Great Britain to regard them as being within her jurisdiction, there never was any prescribing for them, there never was any claim to them. That is the first thing that I think will be established.

The second is, that the United States insistently urged upon Great Britain the inclusion within the conventional limits of the maritime jurisdiction of both countries of bays, chambers within headlands; and Great Britain refused to permit it, expressly.

The third is, that Great Britain not merely refrained from making any claim, not merely refused to permit the United States to get into the treaties a statement of jurisdiction over these large bays, but she industriously and expressly excluded it.

Of course when I say Great Britain made no claim, I have to depend upon a negative. There is none here that I can find, and the only way I can prove that is by reading all these documents, from which I am sure the Court will excuse me.

JUDGE GRAY: I think, Mr. Root, it was with reference to that absence that you speak of in evidence of the assertion or recognition of these other large bays, that Mr. Ewart seemed to depend upon what he called the conventional recognition or agreement between the two parties.



SENATOR ROOT: Yes. The sole suggestion that he had to make of any assertion or claim was by ascribing his meaning to the word "bays" in this treaty.

I have said that the United States sought to include these large bodies of water within jurisdiction, and that Great Britain refused it. That appears from the correspondence which begins on p. 60 of the British Appendix, a letter from Mr. Madison to Messrs. 1302 Monroe and Pinckney, who were the plenipotentiaries engaged in London in negotiating the treaty of 1806. The third paragraph, just below the middle of the page, contains the following statement from Mr. Madison, who was then Secretary of State:—

"With this example, and with a view to what is suggested by our own experience, it may be expected that the British Government will not refuse to concur in an article to the following effect:

"It is agreed that all armed vessels belonging to either of the parties engaged in war, shall be effectually restrained by positive orders, and penal provisions, from seizing, searching, or otherwise interrupting or disturbing vessels to whomsoever belonging, whether outward or inward bound, within the harbours or the chambers formed by headlands, or anywhere at sea, within the distance of four leagues from the shore, or from a right line from one headland to another; it is further agreed, that, by like orders and provisions, all armed vessels shall be effectually restrained by the party to which they respectively belong, from stationing themselves, or from roving or hovering so near the entry of any of the harbours or coasts of the other, as that merchantmen shall apprehend their passage to be unsafe, or in danger of being set upon and surprised."

That is a clear proposal, is it not, to include by convention within the jurisdiction of the two parties chambers formed by headlands, and a territorial zone which extends for four leagues from a line drawn from headland to headland?

SIR CHARLES FITZPATRICK: You would include bays in "chambers formed by headlands"?

SENATOR ROOT: I should say so; yes. I should say so.

SIR CHARLES FITZPATRICK: It is curious they do not use the word "bays," is it not?

SENATOR ROOT: "Chambers formed by headlands" is a much more comprehensive expression I should say; and it was, you will recall, the expression that had been used in the controversy about the King's chambers that had been going on; and it included in the British assertion of jurisdiction very large bodies of water.

JUDGE GRAY: The "Argus" was claimed within a line drawn from headlands a hundred miles apart—those curvatures or convexities of the coast.

SENATOR ROOT: Yes. Now let us see what reception that proposal of Mr. Madison's met with on the part of Great Britain. I will ask the Tribunal to turn to the Counter-Case Appendix of the United

States at p. 95, where there is a report from Mr. Monroe and Mr. Pinckney, who are the negotiators of the treaty of 1806. Just below the middle of the page, after speaking of some other things, in this report dated the 11th November, 1806, they say:—

“The question of blockade, and others connected with it, may, we think, be satisfactorily arranged. They will agree also to acknowledge our jurisdiction to the extent of a league from our coasts; we have claimed that acknowledgment to the extent of three leagues.”

So much for that letter. The next letter is the Holland and Auckland letter on p. 61 of the British Appendix, to which I have already referred. And I beg the Tribunal to consider that letter now with reference to that proposal of Mr. Madison, which was the thing that the American negotiators were urging, and that the British negotiators were considering; and the Tribunal will see that that is the reason why, in the fourth paragraph to which the President refers, he discusses the subject of the space between headlands. That is why after defining the limit of maritime jurisdiction at three miles—the general limit of maritime jurisdiction—they go on to speak of particular circumstances resulting from immemorial usage, geographical position or stipulations of treaty leading to an extension of jurisdiction, which “may therefore, when applicable, be urged as a justification of such a pretension.” They are writing about the proposal of Mr. Madison’s, which is a proposal embracing not merely the width of the territorial zone, but the inclusion in the jurisdiction of the two countries of the chambers between headlands, and carrying the zone outward a long distance beyond a line drawn from headland to headland.

Now I beg the Tribunal to go on to the part of this letter at the foot of p. 61 of the British Appendix, and consider what the British negotiators say further:—

“If your Lordship should deem it expedient on other grounds to concede any extension of jurisdiction to the United States beyond that which their independence necessarily implies, the American commissioners have more than once assured us that they are ready in the article itself to acknowledge it as an exception to the general rule arising from the particular circumstances of their situation and peculiar nature of their coast. We shall also observe that their utmost expectation after our conversations on the subject, is two marine leagues.”

1303 The Tribunal will perceive that what their independence necessarily implies has already been stated in the second paragraph of the letter. They proceed:—

“The disadvantages of such a stipulation to us would be the additional protection of a league to our enemies and to our deserters in the American service, and a fear has also been expressed by a very intelligent sea officer, that the difficulty of ascertaining the distance would add to the frequency of the disputes,” &c.



"We might on the other hand derive some little advantage from the claim it would justify of an extended jurisdiction and consequent protection of revenue and commerce on the coasts of our colonial possessions."

There is squarely the question: Shall Great Britain assent to the insistence of the United States upon this extension of jurisdiction, which includes chambers between headlands, and a broader zone than 3 miles, in view of the disadvantage which would come from additional protection to enemies and in view of the advantage which might be derived from the claim it would justify of an extended jurisdiction, and consequent protection of revenue and commerce on the coasts of the colonial possessions?

THE PRESIDENT: Do you think, Mr. Senator Root, that the circumstances of the time—it was in the height of the power of Napoleon that these transactions took place, 1806—might be of some influence concerning the decision of Great Britain whether the benefits for revenue and commerce ought to be considered, or the difficulties which in this great struggle between maritime power and land power and continental power would strengthen the force of the enemy?

SENATOR ROOT: I am sure those circumstances had a very great weight, and I shall, in a very few minutes state what I think their relation was, and what the effect of these circumstances was. In the meantime, however, let me ask the Tribunal to look at the Monroe and Pinckney report of the 3rd January, 1807, which appears in the Counter-Case Appendix of the United States at p. 96. They are transmitting the treaty itself, and they say, under date of the 3rd January, 1807:—

"The twelfth article establishes the *maritime jurisdiction* of the United States to the distance of five marine miles from their coast, in favor of their own vessels and the unarmed vessels of all other Powers who may acknowledge the same limit. This Government (Great Britain) contended that three marine miles was the greatest extent to which the pretension could be carried by the law of nations, and resisted, at the instance of the Admiralty and the law officers of the Crown, in Doctors' Commons, the concession, which was supposed to be made by this arrangement, with great earnestness. The ministry seemed to view our claim in the light of an innovation of dangerous tendency, whose admission, especially at the present time, might be deemed an act unworthy of the Government. The outrages lately committed on our coast, which made some provision of the kind necessary as a useful lesson to the commanders of their squadrons, and a reparation for the insults offered to our Government, increased the difficulty of obtaining any accommodation whatever."

The treaty of 1806, which is at p. 22 of the same Counter-Case Appendix, shows the result of this negotiation, which began with the proposal of the United States to take into the maritime jurisdiction of both countries an extended belt or territorial zone and the

chambers between headlands and to draw the territorial zone outside of a line extending from headland to headland.

SIR CHARLES FITZPATRICK: At that time England had acquiesced in the claim of the United States with respect to Delaware and Chesapeake?

SENATOR ROOT: With respect to Delaware, yes. Chesapeake had not arisen yet.

SIR CHARLES FITZPATRICK: No.

SENATOR ROOT: It was in 1793 that the Delaware Bay question came up.

SIR CHARLES FITZPATRICK: What year was the Chesapeake Bay question?

JUDGE GRAY: It was after the Civil War.

SENATOR ROOT: 1885; yes, long after.

In view of what the negotiation had been, what the American position had been, and the attitude exhibited by Great Britain according to these letters, the questions as stated by the British negotiators in their report—Lord Holland and Lord Auckland—I ask for a reconsideration of the terms of the treaty of 1806. It says, in article 12, on p. 22 of the American Counter-Case Appendix:—

“And whereas it is expedient to make special provisions respecting the *maritime jurisdiction* of the high contracting parties on the coast of their respective possessions in North America on account  
1304 of peculiar circumstances belonging to those coasts, it is agreed that in all cases where one of the said high contracting parties shall be engaged in war, and the other shall be at peace, the belligerent Power shall not stop except for the purpose hereafter mentioned, the vessels of the neutral Power, or the unarmed vessels of other nations, within *five marine miles from the shore* belonging to the said neutral Power on the American seas.”

You will perceive that they are not fixing *the width of the territorial zone merely*. They are making a rule for the “American seas alone,” and the rule is a *rule of maritime jurisdiction*. They are covering the entire ground for the exercise of sovereignty beyond the limits of the solid earth:—

“*Provided*, That the said stipulation shall not take effect in favor of the ships of any nation or nations which shall not have agreed to respect the limits aforesaid, *as the line of maritime jurisdiction* of the said neutral state. And it is further stipulated, that if either of the high contracting parties shall be at war with any nation or nations which shall not have agreed to respect the said special limit *or line of maritime jurisdiction* herein agreed upon, such contracting party shall have the right to stop or search any vessel beyond the limit of a cannon shot, *or three marine miles* from the said coast of the neutral Power, for the purpose of ascertaining the nation to which such vessel shall belong; and with respect to the ships and property of the nation or nations not having agreed to respect the



aforesaid *line of jurisdiction*, the belligerent Power shall exercise the same rights as if this article did not exist;"

That covers the whole ground on the balance of interests exhibited in the letters of the negotiators, Lords Holland and Auckland, as the result of the resistance of Great Britain under all the circumstances that existed at the time, to the urgency of the Americans. As a result, they agreed upon the line of maritime jurisdiction which is stated here, and that expressly excludes from the maritime jurisdiction of the two Powers the chambers between headlands.

THE PRESIDENT: In the text of article 12 it is stated that this disposition has been agreed upon "on account of the peculiar circumstances belonging to those coasts."

SENATOR ROOT: Yes.

THE PRESIDENT: Is it not possible that this passage "on account of the peculiar circumstances belonging to the coasts" is evidence that this is a specific provision concerning the open coast, and not referring to the bays?

SENATOR ROOT: I could not think of any circumstances more peculiar, as belonging to coasts, than the number, size, and character of the bays which indent them.

THE ATTORNEY-GENERAL: The shelving nature of the coast.

THE PRESIDENT: In the letter from Lord Holland and Lord Auckland to Lord Howick, of the 14th November, 1806 (British Case Appendix, p. 61)—the fifth paragraph seems perhaps to have some connection with article 12:—

"The circumstance however on which the American commissioners have chiefly relied is the *shelving nature of their coast*; and though from the east end of Long Island northwards it does not deserve such a description they allege that it is so broken with rocks as to oblige coasting vessels to keep at a considerable distance from the land."

Could it not be said that in consequence of this mention here of this shelving nature of the coast and of the reference to the peculiar circumstances belonging to the coasts, this article 12 refers only to the coast—to the open coast, in contradistinction to the bays?

SENATOR ROOT: But article 12 cannot refer only to the coasts, because it *in ipsissimis verbis* fixes the maritime jurisdiction, and maritime jurisdiction is an all-comprehensive term. Great Britain cannot have any jurisdiction beyond its maritime jurisdiction. Of course you cannot disassociate the shelving nature of the coasts from the conformation of them, from the bays and from the islands which are referred to here by Lords Holland and Auckland.

SIR CHARLES FITZPATRICK: Your theory is that "coasts" in article 12 includes bays and harbours: "peculiar circumstances belonging to these coasts" would mean peculiar circumstances belonging to these coasts, bays and harbours?

SENATOR ROOT: Of course, on the coasts of their respective possessions; that is an all-embracing term.

1305 SIR CHARLES FITZPATRICK: Yes. You notice on p. 97 of the American Counter-Case Appendix, Messrs. Monroe and Pinckney in their report made a very sharp distinction between coasts, bays, and harbours—the concluding words of the second last sentence:—

“It is fair to presume, that the sentiment of respect which Great Britain has shown by this measure for the United States, will be felt and observed in future by her squadrons in their conduct on our coast, and in our bays and harbors.”

SENATOR ROOT: Yes; I see that. Frequently the word is used most comprehensively; and frequently it is used in a narrower sense.

SIR CHARLES FITZPATRICK: Yes.

SENATOR ROOT: As distinguished from bays and harbours.

SIR CHARLES FITZPATRICK: Except that the letter has reference to the treaty.

SENATOR ROOT: My proposition here is not based on any inference from the use of the word “coast” or any other particular word. It is that this treaty is declared to be for the purpose of *establishing the limit of maritime jurisdiction*. And when you have got that limit of maritime jurisdiction, you have your infallible guide to what “bays” means in the treaty of 1818, if the same view continued. The limit of maritime jurisdiction is fixed here in this treaty as being 5 miles from the shore, or 3 miles in the alternative.

The reason for this is perfectly plain; it is one which has already been referred to by the President. The Prussian decree, made at the instance and under the compulsion of Bonaparte, which declared these coasts here of the North Sea closed against Great Britain, was on the 28th March, 1806. And the first order in council by Great Britain retaliating for that decree, which declared the blockade of the Ems, the Weser, the Elbe, and the Travz was on the 8th April, 1806. On the 16th May, 1806, came the order in council declaring the blockade of the whole coast of the Continent from the Elbe to the Port of Brest. On the 14th October, 1806, came the famous Berlin decree, which put a ban upon all commerce with England. On the 7th January, 1807, came the retaliatory order in council, which declared all neutral trading with France, or from port to port in any possession of France, or of any of the allies of France anywhere in the world, to be cause for condemnation. And on the 17th December, 1807, came the Milan decree, which outlawed England and English ships everywhere. The two countries were in the throes of that titanic conflict which bore very hard upon the United States. England had the greatest navy of the world; the United States had no navy, but she had a great neutral commerce that had grown up. It



was for the interest of England to extend the radius of the operations of her naval vessels clear to the verge of every coast and into every bay in the known world, to free them from all shackles in action; and it was for the interests of the United States to push away from her coasts these hovering war-ships that frightened and drove away the commerce upon which she was growing rich.

I join most heartily in the expression of a kindlier judgment upon the actions which were brought about by the exigencies of that terrible struggle; but in those days they were bitter for the people of the United States. The United States was urging relief, and Great Britain was insisting upon full and unfettered opportunity for her policy.

It is a mistake to look upon the questions that we have here in the light only of Canadian or Nova Scotian or Newfoundland interests. They were part of a great world-wide empire and the policy that Great Britain followed was the policy of the empire. My learned friend has drawn a picture of the inconvenience, the danger, the alarm which would be created by permitting the shelter of a fleet of war-ships in Chaleur or Miramichi—in any of the bays of these dominions. True, that is the Canadian view; a natural view for the inhabitants of these colonies. But, how convenient for the war-ships! How necessary, perhaps, to their operations, on which the fate of empire might depend! That is the British view. Great Britain was needing sheltering bays on every sea, and therefore the policy of empire required that Great Britain should resist the urgency of the United States to withdraw from the general use of the navies of the world, and appropriate to special jurisdiction the chambers within headlands, and a broad strip of territorial zone. That is why England made no claim, and acceded to no proposal for the appropriation of these bodies of water. Justice requires me to assert that in those early days Great Britain never neglected the duty of claiming what she wanted. She refrained from claiming jurisdiction over Fundy and Chaleur and Miramichi and Placentia and Fortune Bays, because, more than she wanted that 1306 jurisdiction she wanted to be free from the jurisdiction of other nations upon other bays all over the world.

I now pass to the proposition that Great Britain has always maintained the same policy and does to this day.

SIR CHARLES FITZPATRICK: Was not the doctrine of the King's Chambers essentially an English doctrine?

SENATOR ROOT: Ah, yes, it was, essentially an English doctrine. In the early times, when nations were isolated, and protecting themselves against the others, then arose the doctrine of the King's Chambers; then arose these claims to sovereignty over closed seas. But, with the new era of commercial freedom, which began in that

wonderful period when, within the space of a few years, Columbus discovered America, and Vasco da Gama rounded the Cape, in the era when Grotius wrote the "*Mare Liberum*"; when great commercial nations arose, and England became the greatest; then the old basis of the doctrine of Kings Chambers became of little consequence compared with the doctrine of freedom upon all other coasts. The importance of that principle of the widest possible extent of freedom, for naval operations, developed by these compelling causes to which I have referred, marks the difference between the Jay Treaty of 1794 and this treaty of 1806. In 1794—the head of Louis XVI had just fallen by the guillotine in the preceding year—a disorderly and tumultuous strife was going on in which all Europe was against republican and communistic France. No powers were tested and no dangers were apprehended. While in 1806 the great genius Napoleon had taken control and was frightening the world, and Great Britain realised that she must fight for her life and for civilisation, the position she assumed then I say she never departed from.

It is very interesting to observe that Great Britain never has made any general claim to sovereignty over the bays that indent her dominions since the passing away of her old, wide, vague claims. The treaty of 1839 with France is an exclusion of such claims. That adopted the 3-mile limit, and it adopted a line of maritime jurisdiction at a point where a bay becomes 10 miles wide. What became of all the rest? That shows that in 1839 Great Britain was not asserting any general jurisdiction over chambers between headlands, bays indenting her territory, merely because they were between headlands, and merely because they indented her territory; but that, as to all the generality of bays, she was willing to fix the limit of her maritime jurisdiction at the point where they became 10 miles wide. The North Sea Treaty of 1882 shows, upon a wider scale, the same disposition.

It is a most interesting fact that nowhere in the long discussions which have occurred between Great Britain and the United States regarding the right of Great Britain to exclude American fishermen from these great bays—nowhere, at no time, has Great Britain ever planted herself upon the proposition that those bays were territorial waters of Great Britain. I confess to some surprise when an examination of this correspondence for the purpose of ascertaining whether that was, or was not, so revealed to me the fact that Great Britain had never planted herself upon that position. She has always stood narrowly upon the construction of the renunciation clause. Canada asserted the territorial right, Nova Scotia asserted it, but Great Britain never. There was an express assertion of a right to exclude Americans from the waters of these bays on



the part of Canada, in a formal communication to Great Britain. It occurs in the letter from Lord Falkland to Lord John Russell of the 8th May, 1841, which appears in the British Appendix at p. 127. Over on p. 128, in stating the views of the law officers of the Colony of Nova Scotia, in the third paragraph, Lord Falkland says:—

“On this point the law officers of the Crown in the colony express themselves *very strongly* both on the general principle of international law and the letter and direct spirit of the Convention. They deem it to be a settled rule, that the shore of a state lying on the sea is determined by a line drawn from the projecting headlands and *not* by following the indentations of the coast”——

Referring to Chitty—

“(vide Chitty—vol. 1st, page 99 & 100, an extract from which is contained in the paper marked No. 2 herewith transmitted) and therefore think it a necessary consequence that the three miles fixed upon by the Convention should always be measured from such a line.”

But they also say that the words of the convention would put an end to the question, if any could be raised on the general rule.

Great Britain never adopted or mentioned that first proposition of the law officers of the colony. She has always stood solely  
1307 upon the construction of the renunciatory clause. And the

Tribunal will observe that she has been admitting from time to time that it was exceedingly doubtful—the construction of the renunciation clause. I began by reading to the Tribunal letters in which they said it is exceedingly doubtful, it is a matter for compromise, and they went so far as to say, among themselves, that we were right; but never did they support themselves by saying: “These are territorial waters of Great Britain.” It would have ended the question if they could have established that. What a powerful support that would have brought to the contention based upon the doubtful construction of the renunciation clause, if they had been able to say: “You have renounced this; but also, this is the territorial water of Great Britain, and you have no business here, anyway.” But they never did—never. That is what makes important the fact that never, in all this long history, has Great Britain given an instruction to a naval officer, and never has a British naval officer made a seizure of an American vessel outside a line measured 3 miles from the shore. Two seizures were made, the “Washington” and the “Argus,” based upon this theory of the colonial law officers—made by colonial vessels, under the command of colonial officers; and upon those two going to arbitration, both of them were decided in favour of the United States and against Great Britain.

THE PRESIDENT: If you please, Mr. Senator Root, is there any treaty, or any Act of Parliament, or any other public Act, in which

the limits of British territorial waters have been fixed for every purpose, in a general way—not only for fishing purposes, as in some treaties, or for the purpose of detaining neutral vessels as in other treaties, or for criminal jurisdiction as in the Territorial Waters Jurisdiction Act? Is there any public Act in which these limits of British maritime sovereignty have been regulated in a general way?

SENATOR ROOT: The only information I can give your Honour on that subject is derived from two communications which appear in the record. One is a report of the Committee of the Privy Council for Canada in June 1886. I think the report was actually made by Mr. Foster, minister of marine and fisheries of Canada. It is on p. 812 of the American Appendix. Near the foot of the page the first of a series of statements of fact which he makes occurs, and I will read it:—

“In the first place the undersigned would ask it to be remembered that the extent of the jurisdiction of the Parliament of Canada is not limited (nor was that of the Provinces before the union) to the sea-coast, but extends for three marine miles from the shore as to all matters over which any legislative authority can in any country be exercised within that space.”

It goes on to say:—

“The legislation which has been adopted on this subject by the Parliament of Canada (and previously to confederation by the Provinces) does not reach beyond that limit.”

It is quite true the Nova Scotia Act of 1836, under which they made seizures, merely reproduced the language of the treaty, and contained no assertion of jurisdiction outside of the 3-mile limit, unless it were involved in a construction of the language of the treaty.

Then, at p. 1083 of the same Appendix, there is a statement about Newfoundland, in the letter from the Duke of Newcastle to Governor Bannerman, of the 3rd August, 1863, which I have already cited upon another question. In that letter this occurs:—

“The observations which suggest themselves to me, however, on the perusal of the draft bill are”——

The draft Bill was to regulate fisheries.

“1st. That if any misconception exists in Newfoundland respecting the limits of the colonial jurisdiction, it would be desirable that it should be put at rest by embodying in the act a distinct settlement”——

That may mean “statement.”

“that the regulations contained in it are of no force except within three miles of the shore of the colony.”

That was the position taken by the Government of Great Britain down so late as 1863.



**THE PRESIDENT:** But there seems to be no law or no treaty in which the limits of British territorial waters were exactly fixed for all purposes. These laws, or these treaties fix the limits, as it seems, only for specific purposes: One for the purpose of fishery, the others for the purpose of limiting the activity of war-ships in time of war, and others for criminal jurisdiction, as is the case in the Territorial Waters Jurisdiction Act.

**SENATOR ROOT:** The broadest is that statement by Mr. Foster regarding the jurisdiction of Canada; but I do not know of any single instrument which undertakes to lay down any theoretical rule. They were dealing with practical questions as they came up. I may say, in passing, that the same limitation exists in the United States. Reference has been made to a Delaware statute. The jurisdiction of Delaware does not go beyond 3 miles. There was a letter of Mr. Jefferson, speaking about the States having passed laws regarding the subject that he was speaking of. The laws are limited to 3 miles.

**THE PRESIDENT:** Then may I ask: Is it to be ascertained when the pretensions of Great Britain concerning the King's Chambers have been abandoned? Is the year to be fixed? I do not know whether the year is to be fixed when these pretensions have been abandoned, or approximately fixed.

**SENATOR ROOT:** I should think, Mr. President, that the best view of that subject to be obtained would be in the opinions of the judges in the case of the *Queen v. Keyn*, in L. R. 2 Exchequer Division, p. 63.

**THE ATTORNEY-GENERAL:** They have never been abandoned. The claims of Great Britain to the King's Chambers stand perfectly good. There was nothing in the case of the *Queen v. Keyn* to diminish or retract those claims.

I hope before Mr. Root leaves this subject I may be permitted to draw attention to one paragraph of one of the letters, which has not yet been read, which I think it is fair I should read before he leaves the subject. It is the fourth paragraph in Lord Holland's letter (British Case Appendix, p. 61). In the earlier part of the letter Lord Holland spoke of the maritime jurisdiction as being limited to a league. Now, says Mr. Root, that fixes the extent of the maritime jurisdiction. But in the other paragraph, relating to the space between headlands, Lord Holland there first mentions bays. He says that they, even at 90 miles' distance between headlands, are "necessarily dependent on and belonging to the adjoining territory"; showing that he distinguishes between territorial jurisdiction over bays which are in the body of the county, and the maritime jurisdiction which he limited to the 3-mile zone around the coast. Mr. Root has treated maritime jurisdiction, which is an expression applicable solely to the maritime zone around the coast, as though it covered bays. Lord Holland and Lord Auckland, and everybody else, treat

bays as being something independent of that. Waters 90 miles between headlands they claim for bays, though they only claim 3 miles on a shelving coast along the open coast.

THE PRESIDENT: I understood, Mr. Root, that you will discuss this passage afterwards? I took the liberty of drawing the attention of Mr. Root to this passage, and he had the kindness to say that he will afterwards discuss this matter in another connection.

SENATOR ROOT: Before we separate, let me say: I have never said that Lord Holland and Lord Auckland had fixed the limit of maritime jurisdiction in this second paragraph of their letter, or that what they say fixes the limit of maritime jurisdiction. I say that they point to two areas of maritime jurisdiction: one the general limit of maritime jurisdiction, and the other the extension of jurisdiction which may be based upon particular circumstances urged as a justification for the extension.

JUDGE GRAY: For the pretension?

SENATOR ROOT: For the pretension, yes; and that when you have got both of them, the general limit which is accorded by all countries to all countries, and the particular extensions based upon the circumstances of each particular case justifying the pretension, when you have got them both, then you have got the limits of maritime jurisdiction, and that there cannot be a bay or a harbour or a creek or an inlet or a roadstead or a coast outside of those limits over which a country has any sovereignty whatever.

[Thereupon, at 12.15 o'clock P. M., the Tribunal adjourned until 2.15 o'clock P. M.]

1309 AFTERNOON SESSION, THURSDAY, AUGUST 11, 1910, 2.15 P. M.

THE PRESIDENT: Will you kindly continue, Mr. Senator Root?

SENATOR ROOT (resuming): Mr. President, I had been pursuing the ascertainment of what was considered to be the maritime jurisdiction of Great Britain upon the American coasts in the year 1818, and I had shown that in the negotiation of the treaty of 1806 the American proposal was, in regard to the maritime jurisdiction of both countries on those coasts (and the chambers formed by headlands), to have the territorial zone pass outside of those, but that had been rejected by Great Britain, and that the two countries had agreed upon an extent of maritime jurisdiction which was measured from the shore, and which was limited to 5 miles from the shore.

I had been stating, too, a series of circumstances which showed that the policy of Great Britain which led her to reject the American proposal to include chambers formed by headlands within maritime jurisdiction of the two countries, and which led her to refrain from



asserting any general jurisdiction over bays, was the continuous policy of the Empire, and continued throughout all this period of discussion.

That leads me to the statement made by Lord Fitzmaurice of the position of the British Government in the House of Lords, on the 21st February, 1907, during the debate regarding a question that had arisen upon the waters of the Moray Firth.

You will recall that Lord Fitzmaurice, in response to a question, said there:—

“I pass to the position of the Foreign Office. The jurisdiction which is exercised by a State over its merchant or trading vessels upon the high seas is conceded to it in virtue of its ownership of them as property in a place where no local jurisdiction exists. Therefore, the first thing that, in these cases, the Foreign Office has to ask is, Was there or was there not, territorial jurisdiction in the place where the alleged events occurred? In regard to that I can certainly say that according to the views hitherto accepted by all the Departments of the Government chiefly concerned—the Foreign Office, the Admiralty, the Colonial Office, the Board of Trade, and the Board of Agriculture and Fisheries—and apart from the provisions of special treaties, such as, for instance, the North Sea Convention, within the limits to which that instrument applies, territorial waters are:—First, the waters which extend from the coastline of any part of the territory of a State to three miles from the low-water mark of such coastline; secondly, the waters of bays the entrance to which is not more than six miles in width, and of which the entire land boundary forms part of the territory of a State. By custom however and by Treaty and in special convention the six-mile limit has frequently been extended to more than six miles.”

As, for example, it had been in the North Sea Convention and the treaty of 1839 with France.

Now, that is no idle remark, it is no indifferent admission or expression: it is a formal and authoritative statement by the Under-Secretary of Foreign Affairs of the position of the Foreign Office and the Colonial Office, and of the other branches of the British Government which have any relation to the subject-matter in regard to the policy of the Empire. It was not a statement made with regard to the particular interests of Canada to a particular bay, or of Newfoundland to a particular bay. It was a statement of the policy of the great Empire which had interests all over the world, and which had a great navy going out on to every sea. And, the statement was a declaration of the same policy which was exhibited by Great Britain in refraining from making any claim to territorial jurisdiction over these Canadian bays generally. It was the same policy which was exhibited by Great Britain in refusing to accept the proposal of the United States to include chambers within headlands in the maritime jurisdiction in 1806, and to pass the territorial

zone outside of the line drawn from headland to headland. It was the same policy which led Great Britain to refrain always, during all these discussions, from ever asserting that the fishermen of the United States were to be excluded from these bays because they were territorial waters, or within the maritime jurisdiction of Great Britain, and to stand always narrowly upon the construction of the renunciation clause.

There was a subsequent reference to this subject in the course of the same debate which is contained in a pamphlet that has already been brought to the attention of the Tribunal, containing the report of the debate for Wednesday, the 11th November, 1907. In that Lord Fitzmaurice explained that in particular places, where what may be called the facts of nature have made difficulties in applying that principle, there are some slight modifications in practice. This does not affect the general principle or the general policy which was stated. It is in strict accordance with the proposal I started with, that in each case where the necessities of protection make the possession of a particular sheet of water seem to a nation desirable 1310 and necessary, she may assert the particular circumstances which make it reasonable that she should appropriate to herself that particular place.

That is quite a different thing, you will perceive, from a general principle that bays indenting the coasts of a country are to be regarded as being within the jurisdiction of the country, because they are indentations running into the territory between headlands.

That special principle would apply to the Bay of Miramichi, and the Bay of Chaleur, if the significance is to be ascribed to these local statutes which my learned friends on the other side ascribe to them. That is the assertion of particular reasons for appropriating and asserting jurisdiction, prescribing, and claiming, in the particular case the right of sovereignty over a particular area of water; but, it brings out in clear relief the general policy, not to regard these indentations as coming within maritime jurisdiction, unless a specific cause is given, and a specific claim made.

Such was the claim made by the United States over Delaware Bay. It, at the instance of Great Britain, and against France, asserted reasons why the principle of protection made it just and necessary that in that particular place the United States should exercise jurisdiction. It did not apply to bays generally, and so, when the agreement was made upon the 5-mile limit, measured from the shore, as the limit of maritime jurisdiction, it was quite consistent with the claim to Delaware Bay, and was an expression of the same policy of Great Britain, thus authoritatively stated by Lord Fitzmaurice in the House of Lords.



And, while I have stated as an inference from general knowledge of the condition of the times and the history of Great Britain that there was a reason in British policy for the adoption and the maintenance of this unvarying course of conduct, I find very powerful support for it in an observation of Lord Lansdowne in this same debate, p. 225 of this same pamphlet of November 11th, 1907.

Lord Lansdowne, whom you will recall as the honoured and highly respected Minister of Foreign Affairs under the last administration of Great Britain, a colleague of our friend Sir Robert Finlay in the Cabinet of which Mr. Balfour was Premier, says:—

“From whatever authority they proceed, I am bound to point out that it is not always very easy to determine where the open sea ends and territorial waters begin; and anyone who has had anything to do with these questions knows that there have been interminable negotiations upon the subject of the right of fishing within bays in different parts of the world, and that if you open the question as between this country and foreign countries in regard to a particular bay in which we are interested, they will desire to have it opened in regard to other bays and enclosed waters in other parts of the world.”

There is the key to the position of Great Britain. That is why she did not make a general claim. She could not make a general claim without laying it open to all of the countries, all over the world, to make similar claims, and the great policy of the Empire overbore and put aside what might have been the particular interest of this comparatively small part of the British Empire. The greater interest controlled.

One further observation I should make about this debate. The debate arose upon the arrest of certain Norwegian fishermen in the waters of the Moray Firth, a great indentation which runs into the coast of Scotland, very much as the Bay of Fundy runs into the coast of the British possessions in North America. There was a statute which in terms prohibited certain kinds of fishing in the waters of that firth; and Norway protested against the arrest of her citizens in that water, which Norway claimed to be the free sea.

Under the old doctrine of the King's Chambers it would have been the territorial water of Great Britain; but the doctrine of the King's Chambers, as it has survived that old period of wide and vague claims, is now a doctrine based upon the circumstances of each case in regard to each area of water, and Moray Firth must depend upon the question whether there were circumstances to be asserted by Great Britain justifying an appropriation by her of the waters of that indentation, and the exercise of sovereignty by her over it.

Upon this debate the Foreign Office of Great Britain allowed the protest of Norway, and released the Norwegian citizens who had been arrested for violating this statute upon that water; and accepted the situation that this statute, which in terms covered this water, was to

be construed as the Courts of England have always construed statutes, that by their terms extend beyond the limits of British jurisdiction, as applying only to British subjects, and not applying to Norwegian subjects.

I now have to state what seems to me a very interesting fact, that this proposal of the Americans, which was the basis of the 1311 negotiation of 1806, to include the chambers within headlands in the maritime jurisdiction of the two countries, and to construe the territorial zone as passing outside of a line drawn from headland to headland, was repeated in the negotiation of 1818.

The proposal was included in the same paper, which included the proposal by the Americans of the fishery article. That is a paper which was submitted by the American plenipotentiaries at the conference of the 17th September, 1818. It is included in article G of that paper, which is not printed in the appendices. Both countries have the paper, and both have printed extracts from the paper, but neither printed this particular part of it. In that proposition which the Americans submitted, article A referred to fisheries, article B related to boundaries, article C related to imports and exports, article D related to slaves, article F related to the general system of impressments, and article G related to limits within which or out of which certain acts of sovereignty by the two countries in respect of the treatment of vessels should be exercised.

Paragraph (d) of article G provided, as proposed by the Americans:—

“(d.) In all cases where one of the high contracting parties shall be at war, the armed vessels belonging to such party shall not station themselves, nor rove or hover, nor stop, search, or disturb the vessels of the other party, or the unarmed vessels of other nations, within the chambers formed by head-lands, or within five marine miles from the shore belonging to the other party, or from a right line from one head-land to another.”

You will see that is a substantial repetition of the proposal of 1806, which was rejected, and in place of which the maritime jurisdiction was fixed as not extending beyond 5 marine miles from the shore. This also was rejected in the negotiation of 1818.

So Great Britain not merely refrained from asserting jurisdiction over bays generally, however large, however small, unless they came within the territorial zone measured from the shore; but she refused, both in the negotiations of 1806, and in the negotiations of 1818, to accept the proposal of the Americans which would include chambers between headlands within the limits of the maritime jurisdiction of Great Britain.

SIR CHARLES FITZPATRICK: What have you just read from? I do not think you gave a note of it.



SENATOR ROOT: I read this extract from the American proposal of the 17th September, 1818, from American State Papers, vol. iv, Foreign Relations, p. 337. That is the same book which is referred to as the source of the extracts from these papers which were printed.

I conjecture that this policy of Great Britain, which I have said accounted for a series of facts to which I have called attention, also accounts for the very curious form of the British Case, Counter-Case, and British Argument before this Tribunal.

The position taken by Great Britain certainly was a curious one; the position that the word "bays" related entirely to geographical bays. Although in argument counsel have claimed that all of these bays were in fact territorial, the position of Great Britain, an authoritative position taken in her pleading, was not that they were territorial, it was that they were geographical, and you will recall that this led to a question by the Court. The Court asked counsel of both parties to tell them whether they understood "the position of Great Britain to be that under the renunciation clause of the treaty of 1818 the United States fishermen have renounced the right to enter bays that are non-territorial as well as those that are territorial. That is to say, bays in the geographical sense of the word without referring to their territoriality."

And in answer, on behalf of the counsel for the United States, I read a series of excerpts from the British Case, Counter-Case, and printed Argument:—

"His Majesty's Government contend that the negotiators of the treaty meant by 'bays,' all those waters which, at the time, everyone knew as bays."

## 2. In the British Case, p. 103:—

"His Majesty's Government contends that the term 'bays' as used in the renunciation clause of article one, includes all tracts of water on the non-treaty coasts which were known under the name of bays in 1818, and that the 3 marine miles must be measured from a line drawn between the headlands of those waters."

They are concentrated at pp. 3900 and 3901 of the typewritten copy of the Argument [pp. 642-3, *supra*].

That to me was a rather curious position. It seems to reject as the basis of the British case, the case on which they stand, the case 1312 on which they can be held internationally—to reject from that any planting of Great Britain on the territorial character of these waters. It is quite in accord with the unvarying conduct of Great Britain. She never had planted herself; the Foreign Office of Great Britain never did plant itself in any discussion with the United States upon the proposal that these bays were territorial waters of Great Britain, and she did not do so here in this case.

Counsel may argue what they please, but the record is a record in which Great Britain has scrupulously refrained from taking that position, and it is reasonable to infer that Great Britain was unwilling to take that position, because she felt the weakness of her position in regard to the construction of the renunciation clause. If we could ever see that reasoned exposition that went from the Foreign Office to the Colonial Office, and is referred to by Lord Stanley in his announcement of the decision of Great Britain in 1845—if we could see that, we should know; but circumstantial evidence of what that contained is clear enough. Observe, I am not seeking to hold Great Britain to that decision. We do not base anything upon that decision, because she withdrew from it upon the objection of her colony. Her colony objected that it would be a bitter stroke at the policy and the interests of the colony, and Great Britain withdrew from it; but it remains that that is what she thought about the merits of this question.

There is the evidence that that is what she thought. She thought that our construction was right. If she had been willing to say this is "within our territorial waters," she would have thought that, no matter whether our construction was right or wrong, it was her duty to exclude our fishermen from those waters in the interest of her colony.

But, there is a further step to be taken in my argument. Not only had Great Britain always refrained from asserting any jurisdiction over those bays, refrained from conferring it upon her colonies, refrained from planting herself upon it, refused to permit jurisdiction to be created by convention with the United States, but she expressly excluded those waters from the limits of her maritime or territorial jurisdiction in the negotiation of the treaty of 1818. She expressly put a limit upon the maritime jurisdiction from which she proposed to exclude American fishermen, exactly as she put a limit upon territorial jurisdiction, or maritime jurisdiction, under the terms of the treaty of 1806, and it was a limit which excluded from that jurisdiction those sheets of water.

The first paper to which I turn in support of that proposition is the Baker letter, so often referred to, the letter of Lord Bathurst to Mr. Baker—Mr. Anthony St. John Baker, who was chargé d'affaires at Washington—dated 7th September, 1815, British Case Appendix, p. 64. You will remember that the negotiators of 1814, after making the treaty of peace of that year, separated without having included in the treaty any stipulation regarding the fisheries, and that some little time after that, the master of a British naval vessel, the "Jaseur," seized an American vessel some 60 miles off the coast of the British possessions. There was an immediate protest and an immediate disavowal of the act of this officer. In disavowing his act in seizing a



vessel 60 miles off the shore, it became necessary, or practically necessary, for Great Britain to put a limit upon her disavowal, to show how far it went. The United States was claiming to have the right to fish clear up to the shore. She claimed that the right survived from the treaty of 1783, which carried her fishermen clear to the shore and into every bay, harbour, creek, and inlet. So when Great Britain made a disavowal of this act of her officer in command of the "Jaseur," it was incumbent upon her to show how far the disavowal went, to guard herself against having it apply to the whole American claim; and in the performance of that duty Lord Bathurst, who then held the seals of the Foreign Office, wrote this letter of the 7th September, 1815, and I will ask you to bear with me while I read it. It is very brief:—

"Foreign Office,  
"September 7, 1815.

"Sir,

"Your several despatches to No. 25 inclusive have been received and before the Prince Regent.

"The necessity of immediately dispatching this messenger with my preceding numbers prevents my replying to the various topics which your more recent communications embrace. I shall therefore confine myself to conveying to you the sentiments of His Majesty's Government on the one requiring the most immediate explanation with the Government of the United States, namely, the fisheries, premising the instructions I have to give to you on the subject, with informing you that the line which you have taken in the discussion on that point, as explained in your No. 24, has met with the approbation of His Majesty's Government.

"You will take an early opportunity of assuring Mr. Monroe that, as, on the one hand, the British Government cannot acknowledge the right of the United States to use the British territory for the purpose connected with the fishery, and that their fishing vessels  
1313 will be excluded from the bays, harbours, rivers, creeks, and inlets of all His Majesty's possessions; so, on the other hand the British Government does not pretend to interfere with the fishery in which the subjects of the United States may be engaged, either on the Grand Bank of Newfoundland, the Gulf of St. Lawrence, or other places in the sea, without the jurisdiction of the maritime league from the coasts under the dominion of Great Britain."

You will perceive that here he draws a line between, on the one hand, all the waters from which it is the purpose of the Government of Great Britain to exclude American fishermen, and, on the other hand, all the waters from which it is the purpose of the Government of Great Britain not to exclude American fishermen. Those waters from which it is the purpose to exclude are described as "bays, harbours, rivers, creeks, and inlets" specifically. They are all within the jurisdiction of the maritime league from the coasts under the dominion of Great Britain, for it is the purpose not to exclude American fishermen from any waters without the jurisdiction of the mari-

time league from the coasts. My learned friends on the other side, reading this letter and giving their own meaning to the word "bays," say that it shows the intention of Great Britain to exclude from bays. But here we have a certain and positive proof of the meaning which the negotiators of the treaty of 1818 and which the Government of Great Britain ascribe to the word "bays" when used in the phrase "bays, harbours, rivers, creeks, and inlets." To a demonstration the bays from which they propose to exclude the fishermen of the United States were bays within the maritime league of the coast.

Can anything be clearer than that? On the one hand, the area of exclusion, of prevention, of prohibition, covering bays, rivers, harbours, creeks, and inlets *within* the jurisdiction of the maritime league from the coasts; on the other hand, the area of freedom *without* the jurisdiction of the maritime league from the coast.

THE PRESIDENT: Was not the expression "places without the jurisdiction of the maritime league" used in the correspondence as designating the places corresponding with the first branch of article 3 of the treaty of 1783? The controversy was whether the whole of article 3 survived the war, or only the first part of it. The British contention was that the second branch of article 3 had been superseded by the war, and was not the language of this correspondence based upon the contradistinction between the places designated in the first and second branches of article 3?

SENATOR ROOT: Doubtless, and this draws an accurate and authoritative line between the two. Those areas which, in this year 1815, the British Government regarded as covered by the first branch, are those outside of the marine league from the coasts. That is the very thing that they are defining. They are drawing a line between the first branch and the second branch of the treaty of 1783 and they are declaring that everything *without* the jurisdiction of the maritime league from the coasts is to be admitted to continue to the United States, under the first branch of the treaty of 1783, and that only such areas of water as are *within* the jurisdiction of the marine league from the coasts, are to be treated as being lost by the United States, because under the second branch of the treaty of 1783.

Now, I might call attention, for a more complete understanding of this letter, to the letters which I read at the opening of my argument this morning. I would refer first to the letter of the Earl of Kimberley to Lord Lisgar, p. 636 of the American Case Appendix, in which the Earl of Kimberley says:—

"As at present advised, Her Majesty's Government are of opinion that the right of Canada to exclude Americans from fishing in the waters within the limits of three marine miles of the coast, is beyond dispute, and can only be ceded for an adequate consideration."



That, you will see, is the same phrase that is used in the letter by Lord Bathurst. Of course, in this letter, Lord Kimberley is using the expression "limits of three marine miles of the coast" in the same sense as "three marine miles of the shore." The memorandum, sent by the Foreign Office to the Governor-General of Canada, which appears at p. 629 of the American Appendix, in the third paragraph, says:—

"The right of Great Britain to exclude American fishermen from waters within three miles of the coast is unambiguous, and it is believed, uncontested."

They use the same expression as the letter from Lord Bathurst to Mr. Baker, and they use the expression "within three miles of the coast" as the equivalent of "within three miles of the shore." The further development of the subject in the memorandum leaves no doubt whatever of that.

Now, will you go back to the treaty of 1818 and read the renunciation clause in the light of this letter of Lord Bathurst to Mr.

Baker:

1314 "The United States hereby renounce, forever, any liberty heretofore enjoyed or claimed by the inhabitants thereof to take, dry, or cure fish on or within three marine miles of any of the coasts, bays, creeks, or harbours of His Britannic Majesty's dominions in America."

and apply to that the declaration of the letter to Mr. Baker that bays, creeks, and harbours are bays, creeks, and harbours within 3 marine miles of the coast, are within the jurisdiction of the maritime league from the coasts, and are not without the jurisdiction of the maritime league from the coasts? If we had had that authoritative clause in the language of the renunciation clause, would there have been any question to discuss here? Is there any room left, with this letter, which my honourable friends have proved here within a few days was read to the President of the United States by Mr. Baker, for the contention that the negotiators of the treaty of 1818 considered, or for a moment supposed, that the maritime jurisdiction of Great Britain, from which they proposed to exclude American fishermen, extended beyond 3 marine miles from the coast; or is there any room left for the supposition that in the renunciation, which applied only to matters in controversy and only to the waters within the maritime jurisdiction of Great Britain, the word "bays" meant anything except the bays that were within that maritime jurisdiction and were a part of the subject-matter of controversy?

THE PRESIDENT: In this supposition, have the words "bays, creeks, and harbours" any distinct meaning, or are they superfluous?

SENATOR ROOT: They have the same meaning that they had in the treaty.

**THE PRESIDENT:** Yes, I mean in the treaty. Have the words "bays, creeks, or harbours" in the renunciatory clause any distinct meaning within this supposition, or are they superfluous? If the words had been left out, would the sense have been different?

**SENATOR ROOT:** They are an enumeration of the different elements of the total coast—the coasts, the bays, the creeks, the harbours. There are two principles under which these words can be classified. There is a series of words which are used to designate the physical conformation of water—gulfs, bays, coves, creeks, inlets. These all relate to the physical conformation. There is another series of words which relate to the use to which they can be put by mankind—harbours, roads or roadsteads, havens, ports. Now, a harbour may be a bay, or it may be the particular kind of bay that is called a cove, a very small one, or it may be the particular kind which is called a creek, which, in common usage, is a long, narrow, winding indentation in the land, and which, in America, by what is purely an Americanism, has come to be extended to the running stream which may come down into this inlet from the sea. When you use the term "bays and harbours" you are using alternative expression for very much the same thing, looking at it, in one way, as to its physical conformation, and, in the other, as to the uses to which it may be put. So, it is an enumeration of the elements going to make up the total coast, going to make up that thing which was granted to the French upon Newfoundland and which was granted to us upon Newfoundland, within limits. Here they go into an enumeration of the elements—coasts, bays, harbours, creeks.

**THE PRESIDENT:** This enumeration would not have been necessary to express the idea?

**SENATOR ROOT:** I think the same idea could have been expressed without it perfectly well.

**THE PRESIDENT:** If the word "coast" had stood alone it might have expressed the same idea, according to your view of the renunciatory clause?

**SENATOR ROOT:** I should think it would have, although it is a little difficult to put oneself in the position of those gentlemen there. I think they were looking at this question from the fisherman's point of view. Naturally, the fisherman looks at things in detail and at short range, rather than from a distance. But, we are precluded absolutely from assigning to the words that were used in this article any meaning to apply to bays or creeks or harbours that will put them outside of the jurisdiction of the maritime league from the coasts.

**SIR CHARLES FITZPATRICK:** They are mere words of description, Mr. Root, I suppose?

1315 **SENATOR ROOT:** I think so, Sir.



SIR CHARLES FITZPATRICK: If the negotiators of the treaty had intended to exclude citizens of the United States from the coasts and the geographical bays what words would they have used?

SENATOR ROOT: You mean from the great bays?

SIR CHARLES FITZPATRICK. Yes, what words would they have used?

SENATOR ROOT: I think they would have used the words "chambers between headlands."

SIR CHARLES FITZPATRICK: Why?

SENATOR ROOT: Because those were the words which were appropriate to discriminate between these interior bays and the greater, outside bays, and they were the words which they had been using in the negotiations of 1806 and the words which they used in their own proposal for this very treaty regarding the maritime jurisdiction.

SIR CHARLES FITZPATRICK: Were those bays described anywhere at that time as chambers between headlands?

SENATOR ROOT: Undoubtedly—including Mr. Madison's proposal for the treaty of 1806 and this proposal relating to maritime jurisdiction in 1818.

SIR CHARLES FITZPATRICK: So you think that "chambers between headlands" would have been a more accurate geographical description of these bodies of water than the term "bays"?

SENATOR ROOT: I think it would have been a more discriminating description of them.

THE PRESIDENT: Would the term "chambers within headlands" express what is meant by the term "bays"? Does it not signify something much larger than bays? For instance, are the celebrated King's Chambers, bays?

SENATOR ROOT: King's Chambers are partly narrow seas and partly chambers between headlands.

THE PRESIDENT: But not bays?

SENATOR ROOT: Yes, chambers between headlands are bays. "Chambers between headlands" was an expression in customary use and was used by these very people to refer to bays, or to indentations in the coast which were larger than the ordinary interior bay that came within the territorial zone measured from the shore.

THE PRESIDENT: For instance, was the place where the "Argus" was seized a chamber within headlands, or was the place where the "Washington" was seized—the Bay of Fundy—a chamber between headlands?

SENATOR ROOT. The place where the "Washington" was seized was a chamber between headlands.

THE PRESIDENT: Would you make no distinction between the place where the "Argus" was seized and the place where the "Washington" was seized?

SENATOR ROOT: There is no distinction between the two places except that the width of the chamber between headlands in the "Argus" case was much greater than the width of the chamber between headlands in the "Washington" case. The "Washington" was seized between headlands in the Bay of Fundy and the "Argus" was seized up here (indicating on map) in an indentation between Cape North and some other point.

THE PRESIDENT: Would the place where the "Argus" was seized, in the geographical sense, be called a bay?

SENATOR ROOT: I could not say whether it would or not. It might as well be called a bay as the Gulf of Lyons or the Gulf of Genoa might be called gulfs. Many quite shallow indentations in the shore are called bays.

JUDGE GRAY: There is Egmont Bay, a very shallow bay on Prince Edward Island, a mere little cove or horse-shoe, and yet it is called a bay.

THE PRESIDENT. Mitchell's map does not call it a bay, but Jefferys' does call it a bay, if I am not mistaken.

1316 SENATOR ROOT: I think it is probable that the use of the words "chambers between headlands" is appropriate to describe bays and perhaps indentations so shallow that they might not be ordinarily called bays, but it is a very comprehensive term and it certainly would include all the bays along these coasts.

It would have included Massachusetts Bay, it would have included Cape Cod Bay—many bays along the coast of the United States to which the United States has never claimed jurisdiction, any more than Great Britain ever claimed jurisdiction to these bays here (indicating on map).

Of course, this term, used in this letter to Baker, which limits the maritime jurisdiction of Great Britain to the maritime league, plainly uses the word "coasts" as identical with the word "shores." That had been the general usage of the parties. I will again call the attention of the Tribunal to these two papers of later date, the letter of the Earl of Kimberly to Lord Lisgar, and the memorandum of the Foreign Office which used the term "three marine miles from the coast" as equivalent to "three marine miles from the shore." The Tribunal will remember that the term was used in the treaty of 1906 "five marine miles from the shore," and an interior line was spoken of as "three marine miles from the coast." Plainly, they were using the two terms convertibly. The Tribunal will remember also that in the report of the American negotiators, which is in the American Appendix at p. 307, they use the term "three miles from shore" as convertible with "three miles from the coast." On p. 307 the report of Messrs. Gallatin & Rush to Mr. Adams, 20th October, 1818, contains this language, in the second paragraph on the page:—



“It will also be perceived”——

They are speaking of the treaty which they transmitted, just signed on that same day.

“that we insisted on the clause by which the United States renounce their right to the fisheries relinquished by the convention, that clause having been omitted in the first British counter-project. We insisted on it with the view—1st. Of preventing any implication that the fisheries secured to us were a new grant, and of placing the permanence of the rights secured and of those renounced precisely on the same footing. 2d. Of its being expressly stated that our renunciation extended only to the distance of three miles from the coasts.”

And the Tribunal will perceive that they had been taking the British Government at its word. They had there this letter of Lord Bathurst to Mr. Baker; both sides had it. And the Tribunal has here the evidence that the American Commissioners understood it as I have been presenting it to the Tribunal, of its being expressly stated that our renunciation extended only to the distance of 3 miles from the coast:—

“This last point was the more important, as, with the exception of the fishery in open boats within certain harbors, it appeared, from the communications above mentioned, that the fishing-ground, on the whole coast of Nova Scotia, is more than three miles from the shores; whilst, on the contrary, it is almost universally close to the shore on the coasts of Labrador.”

There the Tribunal will see they use the word “coasts” and “shores”. convertibly, and they understand the declaration of the Government of Great Britain to Mr. Baker, which draws the line between the first and the second parts of the treaty of 1783, the line between the rights that continued and the rights that ended, to be drawing the line at 3 marine miles from the coast, using that as equivalent to 3 marine miles from the shore.

We are now in a position to understand that there was no inconsistency at all in what Lord Bathurst told Mr. Adams about the Baker letter. The first interpretation of the Baker letter that we have is in Mr. Adams’ report of his conversation with Lord Bathurst immediately after the letter was written. It is to be found in the United States Appendix, at p. 265. Mr. Adams is writing to his chief, Mr. Monroe, the Secretary of State, under date of the 19th September, 1815. Of course Mr. Adams had made the complaint about the “Jaseur” incident, and he was anxious to know what the British Government had done about it, and he went to Lord Bathurst to learn, and was told that Lord Bathurst had sent an instruction to the British representative in Washington, Mr. Baker, and he asked him what it was. I read from about two-thirds down the p. 265:—

“I asked him if he could, without inconvenience, state the substance of the answer that had been sent. He said, certainly: it had

been that as, on the one hand, Great Britain could not permit the vessels of the United States to fish within the creeks and close upon the shores of the British territories, so, on the other hand, it was by no means her intention to interrupt them in fishing anywhere in the open sea, or without the territorial jurisdiction, a marine league from the shore."

1317 The Tribunal will perceive that Lord Bathurst is there stating the vital feature of the letter to Baker, using the word "shore" as the equivalent of the word "coast" which occurs in the Baker letter. He instructed Mr. Baker to say to the American Government in behalf of the Government of Great Britain, that Great Britain did not propose to interfere with the fishing anywhere without the maritime jurisdiction of 3 miles from the coast. And when Mr. Adams asked him what he had written, he said that he had written that it was by no means the intention of Great Britain to interrupt fishing without the territorial jurisdiction a marine league from the shore—precisely answering to what he had directed Mr. Baker to say, substituting the word "shore" for the word "coast." Of course if you ignore that line that is drawn in the Baker letter and give the British sense to the word "bays" in the Baker letter, you have a frightful inconsistency here. You have Lord Bathurst, who was conducting the foreign affairs of a great Empire, either wilfully deceiving Mr. Adams or not knowing the meaning or purport of an important letter that he had just written himself, an important instruction that he had just given himself. As I have shown the true meaning, the consistency is perfect.

Mr. Adams, to have no misunderstanding about what the position of Great Britain really was, in writing to Lord Bathurst shortly after, a few days after, on the subject, recites to Lord Bathurst what Lord Bathurst had told him on this subject.

The Tribunal will perceive that Mr. Adams was not at all grateful for liberty to fish outside the maritime jurisdiction of 3 leagues. What he wanted to do was to combat the determination to exclude us within the 3 marine miles from the shore. He had girded his loins, and set to work to combat that, in this long and elaborate argument of the 25th September, 1815. And in laying down the lines for his argument, he states the position which he is combating, and states it to Lord Bathurst, as being the position that Lord Bathurst had stated to him, a matter about which an experienced man, entering upon an argument, would, of course, be careful and distinct. The statement which he made to Lord Bathurst, of his understanding of Lord Bathurst's communication to him, is just above the middle of p. 269 of the American Appendix. It is the second paragraph on that page. Mr. Adams said:—

"But, in disavowing the particular act of the officer who had presumed to forbid American fishing-vessels from approaching within



sixty miles of the American coast, and in assuring me that it had been the intention of this Government, and the instructions given by your Lordship, not even to deprive the American fishermen of any of their accustomed liberties during the present year, your Lordship did also express it as the intention of the British Government to exclude the fishing-vessels of the United States, hereafter, from the liberty of fishing within one marine league of the shores of all the British territories in North America, and from that of drying and curing their fish on the unsettled parts of those territories."

If there was any uncertainty about that, any mistake, any misunderstanding, there was a challenge to Lord Bathurst to state it. But Lord Bathurst acknowledges the receipt of that letter—Dr. Lohman has already called attention to that fact—on the 30th October, and the acknowledgment and answer appear at p. 273 of the American Appendix, near the foot of the page. I will read the first paragraph of Lord Bathurst's letter:—

"The undersigned, one of His Majesty's principal Secretaries of State, had the honor of receiving the letter of the minister of the United States, dated the 25th ultimo, containing the grounds upon which the United States conceive themselves, at the present time, entitled to prosecute their fisheries within the limits of the British sovereignty, and to use British territories for purposes connected with the fisheries."

And then he proceeds to attempt to confute the arguments of Mr. Adams in respect of the proposal of Lord Bathurst which Mr. Adams had quoted to him in the letter that he is acknowledging. I do not see how you can have any statement of the position of a Government more clear and distinct than we have it here; and I need not cite to the Tribunal the record to show that these papers were in the hands of the negotiators of 1818 on both sides. Both the instructions sent by the State Department of the United States to Mr. Gallatin and Mr. Rush referred them to these papers, and the instructions sent to Messrs. Robinson and Goulburn by the British Foreign Office referred them to these papers. They say: "You have them." And they did have them, and their understanding from them was necessarily complete and distinct as to what Great Britain's claim to the extent of her maritime jurisdiction was; that jurisdiction, within which the renunciation clause must be limited, and within which must have been all the coasts, bays, harbours, and inlets, mentioned in that renunciation clause.

1318 That leads us to a conclusion regarding the meaning of the word "bays" in the renunciation clause that agrees perfectly with a variety of circumstances tending in the same direction. In the first place it agrees with what we would naturally suppose was meant by the use of the word in the class of places in which we find the word "bays"; "coasts" in the distributive sense, bays, creeks,

and harbours. On the principle *ejusdem generis*, the kind of bays they were talking about were the kind of bays that could be classified properly with creeks and harbours—not these great stretches of sea belonging to a different classification, and which must be considered with a different set of ideas altogether. It agrees with the inference we would naturally draw from the fact that these men who were making this treaty were treating of bays as places for shelter, and for repairs, and for obtaining wood and water. It is probable that men who were thinking about bays as places for shelter and for repairs and for obtaining wood and water should, when they used the word “bays,” use it with reference to that kind of a bay. It agrees with the inference we would naturally draw from the use of the word by men——

SIR CHARLES FITZPATRICK: Pardon me a moment, Mr. Root. You say “that kind of a bay.” That would be a bay which would form part of a coast; that is to say, a bay less than 6 miles wide?

SENATOR ROOT: It would be a bay where people could find shelter; where they could——

SIR CHARLES FITZPATRICK: You say “such bays” would mean the bays referred to above, which bays would be, on your construction, bays less than 6 miles wide?

SENATOR ROOT: Precisely. And there let me make a remark about an argument that has been made on the other side that that would exclude all bays larger than 6 miles from the liberty of access for shelter, and so on. No! Because they can go for shelter wherever they find a harbour.

SIR CHARLES FITZPATRICK: That is not under the treaty?

SENATOR ROOT: Under the treaty. They can go for shelter or for repairs or for wood and water wherever they find a harbour: “Provided, however, that the American fishermen shall be permitted to enter all such bays or harbours;” and there is a harbour wherever you find a shore under the lee of which you can come to and keep from being blown out of water. But that is incidental.

The conclusion to which these facts have brought us, or have brought me, and I hope have brought the Tribunal, agrees with the inference you would naturally draw from the fact that these men were talking about drying and curing fish on bays, and would naturally have in mind the kind of bays in which you can dry and cure fish. They would naturally have in mind the kind of bays which could be settled. They were not talking about settling the Bay of Fundy. People settle the little places where there are little strips of arable land running in from the sea, a little beach, a place where a fisherman’s hut could go, or where there may be a place for a farmer like places in the little valleys among the hills. They agree with the inference that you would naturally draw from the fact that



this term "coast" was used distributively: "On or within 3 marine miles of any of the coasts"—looking at it as a fisherman would look at it, going along the coast, one coast on the starboard and another to port. And they answer to the requirement which was fundamental in this whole business, that they should draw a line that a fisherman could find. I do not care so much whether you can find a line with the help of all of these gentlemen here. The treaty was not made for you and me. It was not made for gentlemen to find a line by poring over a chart. It was made for fishermen, going out on to the sea with their small boats, to navigate in fair weather and in storm, by daylight and in the dark, in clear weather and in fog; and when the treaty makers were laying down a line, they were bound to lay down a line, and we are bound to assume that they were laying down a line that a fisherman could find. What fisherman could find a line 3 miles outside of a line 60 miles in length drawn from Grand Manan to the headland here (indicating on the map) not clear across the bay; that would be more than 100 miles; but a line from the headland of Nova Scotia to the nearest point of British land on the other side of the Grand Menan, or Mur Ledge, which I think sticks up out of the water, is a full 60 miles in length. What fisherman could, on peril of the seizure and forfeiture of his vessel, be expected to find that line. It would be wholly impracticable. That is

1319 not the method by which international law proceeds to construe instruments. There is a basis for that talk in these letters here, that old idea about being able to see from headland to headland, taking in what comes within a line of sight. It is because the rules of international law are made, and treaties are construed for the practical use of mankind. You do not give a book on navigation to an unlettered fisherman who is to sail along the coast and find his way to the place where he earns his daily bread. You give him a rule of thumb; you give him something he can see and guard himself by. And the conclusion to which we have come here, upon these plain declarations of Great Britain as to what the limits of her territorial sovereignty, of her maritime jurisdiction were, is in agreement with the requirements of the making of this treaty—to lay down a line that fishermen shall not transgress, that it is possible for a fisherman to find.

THE PRESIDENT: If you please, Mr. Senator Root, is the word "any" in the renunciatory clause in no connection with the word "bays," or is it to be considered as having relation to the word "bays"?—

"On or within three marine miles of *any* of the coasts, bays, creeks or harbours."

SENATOR ROOT: I should think that that qualified the whole.

THE PRESIDENT: The whole?

SENATOR ROOT: I should think so.

THE PRESIDENT: Then it refers also to "bays"?

SENATOR ROOT: Yes; any of the coasts, bays, creeks or harbours.

THE PRESIDENT: Then it would be the same if it said "of any of the coasts, any of the bays, creeks, or harbours," if it refers to the whole? One could repeat before every one of those words?

SIR CHARLES FITZPATRICK: It must be repeated, under grammatical construction.

SENATOR ROOT: It would not give the same force of classification as where they are grouped in under the same words. "Any of the coasts, bays, creeks or harbours" carries the idea of a combination of coasts, bays, creeks or harbours; and any of those combinations of coasts, bays, creeks or harbours is the idea carried in this form of words.

SIR CHARLES FITZPATRICK: If you were parsing that sentence, would you not say "of any of the coasts, of any of the bays, of any of the creeks or of any of the harbours"?

SENATOR ROOT: I should say "any" qualified all those words.

In connection with this suggestion, I think the distributive use of the word "coasts" occurred in the treaty of 1783, as well as in the treaty of 1818, and I think that it had its origin in one of the British proposals, which appears at p. 96 of the British Counter-Case Appendix. This paper in which this occurs is a draft of the preliminary articles sent by Mr. Townshend to Mr. Strachey, and the whole thing consists of proposals made by the British at a meeting which, I think, was on the 25th November, between the negotiators, in 1782. That proposal I will read, from about the middle of the page:—

"The citizens of the United States shall have the liberty of taking fish of every kind on all the banks of Newfoundland, and also in the Gulf of St. Lawrence, and also to dry and cure their fish on the shores of the Isle of Sables, and on the shores of any of the unsettled bays, harbours, and creeks of the Magdalen Islands in the Gulf of St. Lawrence, so long as such bays, harbours, and creeks shall continue and remain unsettled. On condition that the citizens of the said United States do not exercise the said fishery, but at the distance of Three leagues from all the coasts belonging to Great Britain, as well those of the continent, as those of the islands situated in the Gulf of St. Lawrence. And as to what relates to the fishery on the coasts of the island of Cape Breton out of the said gulf, the citizens of the said United States shall not be permitted to exercise the said fishery, but at the distance of fifteen leagues from the coasts of the island of Cape Breton."

That is treating these coasts distributively and separately. It is not treating of a great coast as a whole, as we shall think of it when we sail back to America. It is treating specifically of the shores and of the unsettled bays, harbours, and creeks of the Magdalen



Islands, and of the coasts "as well those of the continent as those of the islands, and the coasts of the Island of Cape Breton." When they came to agree upon an article, they rejected the quite narrow specification of limits within which the Americans might fish, and they put in "any of the coasts."

1320 THE PRESIDENT: But is the "any" also in the grant, or is it only in the renunciation? I think it is not in the grant. It is only in the renunciation. In the treaty it reads:—

"And also on the coasts, bays, harbors, and creeks, from Mount Joli, on the southern coast of Labrador,"

And, in the first part:—

"on that part of the southern coast of Newfoundland," &c.

There is no "any." As to the drying and curing—

SENATOR ROOT: In the treaty of 1818?

SIR CHARLES FITZPATRICK: No, 1783.

THE PRESIDENT: Ah! In the treaty of 1783, you mean?

SENATOR ROOT: Yes.

THE PRESIDENT: Oh! I beg pardon. Well, I do not believe it is there, either.

SENATOR ROOT: They have a number of forms of this third article of the treaty of 1783. The first one—

THE PRESIDENT: As to the drying and curing, the word "any" is in, but not as to the right of fishing.

SENATOR ROOT: The first form that they agreed upon for the treaty of 1783 gave general reciprocal fishing rights both to United States and Great Britain on all places where they had been accustomed to fish. The second form contained some limitations, not very great; and the third form was this which I have been reading. That was not agreed to, but instead of agreeing to it, that was made the basis of a modification, and the next form was what came out finally as the treaty. Instead of talking about the shores of the Isle of Sables, and the "shores of the unsettled bays, harbours, and creeks of the Magdalen Islands," and the coasts of the continent, and the coasts of the islands and the coasts of Great Britain, they said:—

"the people of the United States shall continue to enjoy unmolested the right to take fish of every kind on the Grand Bank . . . and also that the inhabitants of the United States shall have liberty to take fish of every kind on such part of the coast of Newfoundland, as British fishermen shall use. . . . and also on the coasts, bays, and creeks of all other of His Britannic Majesty's dominions in America, and that the American fishermen shall have liberty to dry and cure fish in any of the unsettled bays, harbors, and creeks of Nova Scotia, Magdalen Islands," &c.

The distributive idea which is carried in this proposal, by the specification of particular coasts, particular places, is carried in the

final form which grew out of this in the difference which the President has already called attention to, between the singular use of the word "coast" and the plural "the coasts, bays, and creeks of all other of His Britannic Majesty's dominions."

THE PRESIDENT: That was a great success of the American negotiators, that they obtained all—the whole coast.

SENATOR ROOT: Yes; it certainly was.

THE PRESIDENT: But I thought, Mr. Senator Root, that you were referring to this passage as explaining the word "any" in the treaty of 1818; and I found——

SENATOR ROOT: No; I was referring to the treaty of 1783.

THE PRESIDENT: Yes.

SENATOR ROOT: I think the use of the word "any" carries the distributive idea, shows that they were thinking of these things not *en bloc*, but as separate elements of consideration, and that it also carries the idea of the completeness of the renunciation. After reciting that differences had arisen, and after providing that the inhabitants of the United States shall have liberty to take fish within certain specified limits, then the purpose of the renunciation was to cover everything else, and to make it a complete renunciation. They must either say: "The United States renounces the liberty heretofore enjoyed or claimed to take, dry, or cure fish on or within 3 marine miles of all the coasts, bays, creeks, and harbours of His Britannic Majesty's dominions not included within the above-mentioned limits," or they must say: "Renounces the liberty to take, dry, or cure fish on or within 3 marine miles of *any* of," &c. Either use of words serves to accomplish the effect of completeness of the renunciation. To use the word *all* would have carried the idea that they were looking at them *en bloc*. To use the word *any* accomplishes the completeness of the renunciation equally, but carries the idea that they were looking at them as separate elements.

I wish here to make a few further remarks. If the Tribunal will give me a very few minutes more I can complete what I have to say on this subject to-day.

Something has been said here about the relaxation of the British position regarding the Bay of Fundy in 1844 constituting an arrangement between the two countries. That is negatived positively by Lord Malmesbury in a letter to Mr. Crampton, the British Minister at Washington, on the 10th August, 1852, which appears in the American Appendix at p. 518, where he says that everything but the Bay of Fundy was left for further negotiation.

Quite an argument has been made here to the effect that the French order ordering the American fishermen off the coast of Nova Scotia in 1820 and 1821, and which was the subject of diplomatic



remonstrance on the part of the United States, carried an inference that the United States recognised the right of Great Britain to control the waters of St. George's Bay in Newfoundland. The fact is that it appears with the greatest fullness in these affidavits that the French cruisers ordered these American fishing-vessels off the coast; they forbade them to fish anywhere on the coast; and there is not a bay on that coast that is more than six miles wide at the mouth except St. George's Bay; and the bulk of the vessels were not at St. George's Bay. They were up in the Bay of Islands, and along there. Of course nothing was ever said about the fact that there was a part of St. George's Bay that they were entitled to fish in. That was of no consequence. They could not accomplish anything by fishing in the open portion of that one little bay. They were not permitted to come within the limits of the 3-mile zone, or into any bay or creek or inlet or harbor on that coast unless they did it at the peril of seizure by the French cruiser. That was the subject matter of the controversy. Of course it carried no inference whatever regarding the use of the water outside of that which the Americans claimed under their treaty, and which they went there to enjoy. An inference has been drawn from the fact that there was a resolution of the American Congress in 1789 in which the words "coasts, bays, and banks" were used; and that is in the British Counter-Case Appendix at p. 13, a little below the middle of the page. A substitute was moved by Mr. Morris, in the words following:—

"That an acknowledgment be made by Great Britain of a common right in these states to fish on the coasts, bays, and banks of Nova Scotia, the banks of Newfoundland and Gulf of St. Lawrence," &c.

And the inference drawn was that the American Congress considered "bays" as a different thing from "coasts and banks"; and having said "coasts" they must also say "bays." It is not of much consequence, but if you will turn over to the next page, p. 14, you will see that that resolution was finally adopted with the omission of the word "bays." Just above the middle of the page is the resolution as finally adopted:—

"That the right of fishing on the coasts and banks of North America be reserved to the United States as fully as they enjoyed the same," &c.

THE PRESIDENT: But, by the words "as fully as they enjoyed the same when subject to the King of Great Britain,"—by the use of these words, is not "bays" included?

SENATOR ROOT: Certainly.

THE PRESIDENT: Therefore it was not necessary to mention bays specifically?

Senator Root. Certainly; it was not necessary to mention bays specifically. The argument of the Attorney-General was that the mention of them indicated that we thought it was necessary to mention them. The first form of the resolution mentioned coasts, bays, and banks; and my learned friend founded an argument on the fact that "bays" were specially mentioned.

THE PRESIDENT: Might it not be said that in the first form the mentioning of bays was necessary, because there could be some doubt whether "coasts" embraced bays; whereas, in the second form, 1322 where it is said "as fully as they enjoyed the same when subject to the King of Great Britain" there could arise no doubt that the word "coasts" embraced in this connection also the bays, because there is no doubt that when they were subjects of the King of Great Britain they had also the right to fish in the bays?

SENATOR ROOT: Well, perhaps that may be said. But my particular object here is to destroy the argument of the Attorney-General, which, certainly, is destroyed if you find that the word on which the argument is based was not included in the final form of the resolution.

The Attorney-General has founded an argument here upon the use of the term "bays" in some of the old treaties, the treaty of 1686, between Great Britain and Spain, I think it was, and the treaty of 1778 between the United States and France. The phrase used in both was "havens, bays, creeks, roads, shoals, and places." There are two things that are said about that by the other side: One is that it shows that "bays" were considered of very great importance. It does not show that they were considered of any more importance than "havens, creeks, roads, shoals, and places." In the time when the subject of jurisdiction and right of control over the sea was very unsettled, people making treaties about portions of the sea next to the land used to put in everything they could think of to describe those portions, because they had not any definite line of jurisdiction to appeal to; and that is what was done here. It does not show any importance, particularly, given to bays; and you can draw no inference from it about the meaning of bays without putting that meaning into it. If you assume that "bays" here mean what Great Britain says "bays" mean in the treaty, then you have something in which "bays" will be of some help to them, because they would say: "Here is a treaty in which 'bays' is used with this meaning." But you have to put the meaning into it in order to get it there; and there is nothing in the treaty which shows what kind of bays they were talking about. If there is any inference to be drawn from the occurrence of the word in this connection, it is the inference that people had been in the habit of using the word as designating something quite close to the shore, and something in the way of interior waters. If it ever is permissible to say



*noscitur a sociis*, you can say it here. The bays here are the bays that associate with havens, creeks, roads, shoals, and places. The word "places" is quite general, of course, but all the other things are things quite close to the shore; so that if there is any inference from those treaties, it is an inference that is quite favourable to the United States.

I shall not take the time to go into an examination of the local statutes in regard to the bays of Chaleur and Miramichi further than to say that the statute about Chaleur applied only to the beaches, the shores, and did not relate to the general surface of the bay. Chaleur lies between the old province of Lower Canada and New Brunswick, and the line of Lower Canada ran along the north shore of the Bay of Chaleur, while New Brunswick was bounded by the bay on the north. These statutes were statutes which related to the use of the north shore of the bay in Lower Canada, and her jurisdiction was bounded, not by the bay, but by the north shore; and an examination of the statutes will show that they had no relation to the general body of water at all. Perhaps they may have had a relation to the water in connection with the shore, but nothing which could run out anywhere in the neighborhood of the 3-mile line.

SIR CHARLES FITZPATRICK: Is that the statute that provides for the boundary between Old Canada and New Brunswick?

SENATOR ROOT: That is a different statute. I stated what I understood to be the fact, and which I believe would be found in that statute to which you referred, Sir Charles, but the statute I am now referring to was one in 1785, to be found in the British Appendix at p. 554.

SIR CHARLES FITZPATRICK: That is the old statute that provides for fishery regulations made by the coroner or the Justice of the Peace.

SENATOR ROOT: That is another one, that I referred to the other day. Then, there is another statute of 1788, to be found in the British Appendix at p. 592.

JUDGE GRAY: Where in the British Appendix is the first, the statute of 1785?

SENATOR ROOT: The statute of 1785 is in the British Appendix at p. 554; the statute of 1788 is in the British Appendix at p. 592.

Along down in 1887, during the discussion of the Bayard-Chamberlain treaty, Lord Salisbury makes a note, upon one of the 1323 American *projets*, with regard to Chaleur, in which he refers to a subsequent statute as amounting to a claim to have territorial jurisdiction over it. That was a statute passed in 1851, which is not in the Appendix, and does not appear except that Lord Salisbury refers to it.

Then, with regard to Miramichi, there was the statute of 1799, which appears in the British Appendix at p. 597, and one of 1810, which appears in the British Appendix at p. 603. I think those were the only ones counted upon. The first, of 1799, was chiefly a shore statute, but I think it prohibits the casting of gurry for several leagues out from the shore, and so far as to be plainly applicable only to citizens of New Brunswick. And the one of 1810 provides for placing buoys in Miramichi, and for the imposition of dues upon vessels coming into the bay.

THE PRESIDENT: The statute of 1799, concerning Miramichi, in section 2 refers also to the placing of seines, or nets in the bay or river Miramichi or its branches except as thereinbefore provided for, except at the places admitted by section 1.

SENATOR ROOT: Yes.

THE ATTORNEY-GENERAL: This statute for settling the boundaries is on p. 572.

SENATOR ROOT:—Yes; Mr. Anderson has just called my attention to that. That statute carries the boundary of New Brunswick down through the middle of the Bay of Chaleur to the Gulf of St. Lawrence, and that is the statute of 1851 that Lord Salisbury refers to.

I shall take up no more time with these statutes, further than to say that, in our view, they do not constitute such a claim to territorial jurisdiction over the waters of these bays as to have any effect internationally; and of course they were never referred to in any way whatever or made any ground of prescription, or definition of maritime jurisdiction of Great Britain before or at the time of negotiations of 1818.

One other subject I ought to speak of, and that is what the Attorney-General said about the renunciation clause. He says there were two renunciation clauses: one of the British and one of the Americans. The difference between them is that one was a renunciation clause and the other was not. The American proposal was the renunciation clause with which we are familiar. The British proposal was contained in article A, presented by the British, to be found on p. 312 of the American Appendix. That article begins by saying that the "inhabitants of the United States shall have liberty to take fish" on such and such coasts. Then follows a regulation regarding the rivers, and then follows this, which is the British substitute for the renunciation clause as we now have it:—

"His Britannic Majesty further agrees that the vessels of the United States, *bonâ fide* engaged in such fishery, shall have liberty to enter the bays and harbors of any of His Britannic Majesty's dominions in North America, for the purpose of shelter, or of repairing damages therein, and of purchasing wood and obtaining water, and for no other purpose; and all vessels so resorting to the said bays and



harbors shall be under such restrictions as may be necessary to prevent their taking, drying, or curing fish therein."

That is not a renunciation clause. That is a grant. That is a grant from Great Britain. And the difference between the two is that the clause proposed by the Americans renounced the right of taking and drying and curing of fish, and, by necessary implication, asserted that the Americans had the right that they were renouncing; while the clause proposed by the British granted a right for specific purposes, and, by necessary implication, asserted that the British had the right that they were granting. The two are world-wide apart. One is a renunciation and the other is not. Of course the Americans were abandoning their claim of right to all the coasts, that they did not expressly get granted to them in this article. They were abandoning it. They could no longer have it when the settlement had been made upon the basis of their having a right to fish only on such and such coasts. But the American renunciation was an abandonment by their renouncing what they had, what they still asserted was theirs, while the British proposal was that the abandonment should be accomplished by being silent, assuming that they had nothing except what the British chose to grant in making an express grant for that purpose.

There is only one other subject to which I feel bound to refer, and that is the Webster circular, or the Webster pronunciamento or proclamation. That paper appears in the British Appendix, p. 152, and it is the contention of Great Britain that that paper was a surrender by the United States, or an admission by the United States, that the treaty did give to the renunciation clause the effect of covering these great bays. It is an extraordinary statement—extraordinary in every feature; and it is especially extraordinary in the fact that it says, at the same time, that—

"It would appear that, by a strict and rigid construction of this article, fishing vessels of the United States are precluded from entering into the bays or harbors of the British provinces."

and that it was an oversight in the negotiators of the treaty to make so large a concession to England, and that Mr. Webster does not agree with the construction put upon the treaty which makes it a concession. A most amazing paper, by the Secretary of State of the United States, charged with the conduct of her foreign affairs. The lines were drawn, and had for years been drawn, between the two countries in direct opposition upon the construction of this treaty; and he issues this public proclamation, which he publishes in a newspaper. It is quite inexplicable upon any ordinary grounds, in any ordinary way. Mr. Everett says, in a letter which appears at p. 543 of the American Appendix, that Lord Malmesbury ascribed the extraordinary nature of the paper to two causes: one "the influences which period-

ical events exercised in those localities might perhaps be able to account for," that is to say, political exigencies; and the other that the preparation of the notice was to be ascribed "to the excitement induced by the disease, whose fatal termination he handsomely laments." I would rather that he had given only the latter explanation. I think it was the true explanation. Within a few weeks after the publication of this extraordinary document, Mr. Webster died. He was a very great man—one of those rare men of power and genius, surpassing ordinary men, who come in a century or two in a country. He was an advocate of such power and cogency of reasoning that now, almost a century after they were delivered, his arguments are cited at the bar, as are the decisions of the great judges before whom he practised. He was a diplomatist of great wisdom and courage. It was he who made with Lord Ashburton the most important treaty that has ever been made to preserve peace between Great Britain and the United States, in settling the boundaries, the Webster-Ashburton Treaty of 1842. He was a statesman of commanding influence in his country, and it was his voice more than any other, more than all others altogether, that built up in the people of the United States that sentiment of loyalty, of union, and of love for freedom that in the great civil war enabled the north to determine, by the issue of the sword, that our country should be free. His influence over his country passed beyond that of any man, unless it be the influence of Washington and of Lincoln. The boys of America have all been thrilled with a kindlier feeling, and a quicker pride in the ties of blood to the great empire that Webster described to them—the empire "whose morning drum-beat, following the sun and keeping company with the hours, encircles the earth with one unbroken strain of the martial airs of England." Altogether he was the man of his time, from whom was to be especially expected wisdom, judgment, cogency of reasoning and effectiveness in maintaining the part of his country in a discussion of this kind. Yet look at this paper! We must conclude that the fatal disease that took him from earth within but a few short weeks was the origin of such an incoherent and insensible document.

I am indebted to this case for a kindlier feeling toward President Fillmore, because of the kindly way in which he performed his duty, of instantly setting right the erroneous impressions that might be derived from this public document. It appears in the record that Mr. Fillmore, on the day after the paper was published, had an interview with the British Minister in which he stated authoritatively what the position of the United States was, and that on the same day he wrote a letter to Mr. Webster. The paper was published on the 19th July, and on the 20th July there was an interview between Mr. Fillmore and Mr. Crampton that appears in the British Appen-



dix at p. 154. Mr. Crampton is reporting that interview to the Earl of Malmesbury, and in that letter the Tribunal will see that Mr. Fillmore distinctly stated what his view was. In the last paragraph on p. 155, Mr. Fillmore said to Mr. Crampton:—

“What he would propose was that Mr. Webster and myself should make some temporary arrangement of the matter until the true sense of the treaty should be determined by the two governments between themselves, or, if necessary, be referred to the decision of some friendly power.”

And in the paragraph before, he stated his view; he said:—

“We had been examining the Convention of 1818, he said, and although he contested the construction put by the British Law Officers upon the clause regarding the limits assigned, within which American fishermen could not legally carry on their operations, he nevertheless admitted that the wording of the passage, which he thought somewhat obscure, countenanced to a certain degree that construction.

With regard to the opinion of the Law Officers of the Crown 1325 by which this construction was maintained, he remarked, however, that it seemed to him singular that they adverted to expressions as being used in the Treaty which were nowhere to be found in it: he alluded to that part of the opinion where it is said, ‘as we are of opinion that the term headland *is used in the Treaty* to express the part of the land we have before mentioned including the interior of the bays and indents of the coast.’ Now, said Mr. Fillmore, there is no such term as headland in the Treaty at all, which would look as if the opinion had been drawn up without reference being made to the text of the Convention of 1818. He also remarked that as well as he had been able to ascertain the fact, the Government of the United States had, on various previous occasions, contested the construction maintained by the opinion in question.”

And the interview closed by his saying:—

“while the United States Government, on the other hand, should take every means in their power to prevent their own citizens from fishing within the prescribed distance as understood by the British construction, until such time as the question as to which construction ought to prevail, should be determined on, or until the question should be otherwise disposed of by treaty or mutual legislation.”

And on the same day, in Mr. Fillmore's letter to Mr. Webster, not criticising him, or finding any fault with what Mr. Webster had done, but in the most kindly and respectful way, he suggests to him that he and Mr. Crampton should concur in a statement as to the position of both countries upon this question; and here is the way in which Mr. Fillmore wished it stated:—

“but as for those waters in the several bays and harbours which are more than three marine miles from the shore of such bay or harbour upon either side, and within three marine miles of a straight line drawn from one headland to the other of such bay or harbour, that you as the Representative of the United States conceived that our

fishermen have the right under the Treaty to fish therein, but the British Government having held that by a true construction of the Treaty such right belonged exclusively to British subjects; and as those waters were thus in dispute between the two nations, you respectively advised the citizens and subjects of both countries not to attempt to exercise any right that either claimed within the disputed waters until this disputed right could be adjusted by amicable negotiation."

That is the disposition of the subject made by Mr. Webster's superior in office, Mr. Fillmore, immediately upon the publication of this paper of Mr. Webster's; and the substance of the same thing was communicated to the British Ambassador. And so the Webster paper must go for naught as any expression of the position of the Government of the United States, or as effecting in any way the opinion of Great Britain regarding the position of the United States; and we must deem it as one of those mistakes for which the great are to be forgiven when they are gone.

That brings me to the end of what I have to say on the Fifth Question, and I shall very easily conclude what I have to say during the day to-morrow, and perhaps before the conclusion of the time to-morrow.

SIR CHARLES FITZPATRICK: Mr. Root, if you will kindly pardon me for a moment, may I ask you to revert again to the Bathurst letter on p. 64 of the British Appendix? I would like you to say whether I have understood your argument based upon that letter correctly. I understand your argument to be that the bays from which Lord Bathurst says it is the intention to exclude United States fishermen are not the bays of all His Majesty's possessions, but only such of those bays as are within the jurisdiction of a maritime league?

SENATOR ROOT: I do not say they are not the bays of all His Majesty's possessions. I say that they are only the bays that are within the jurisdiction of the maritime league.

SIR CHARLES FITZPATRICK: You say the bays of His Majesty's possessions are those which are within the maritime league?

SENATOR ROOT: Yes.

SIR CHARLES FITZPATRICK: In the sense of that letter?

SENATOR ROOT: Yes.

[Thereupon, at 4.35 o'clock P. M., the Tribunal adjourned until to-morrow, Friday, August, 12th, 1910, at 10 o'clock A. M.]



The Tribunal met at 10 o'clock A. M.

THE PRESIDENT: Will you kindly continue, Mr. Senator Root?

SENATOR ROOT: As to Question Two:—

“Have the inhabitants of the United States, while exercising the liberties referred to in said Article, the right to employ as members of the fishing crews of their vessels persons not inhabitants of the United States?”

As to the scope of the question: In the view of the United States, if the Tribunal said that the inhabitants exercising the liberties referred to have or have not a right to employ any persons who are not inhabitants of the United States, the question is answered; and to undertake to say that they have or have not a right to employ all persons in the world who are not inhabitants of the United States would be wholly unnecessary to a resolution of the question, and wholly impossible for any Tribunal to undertake.

The question points directly and solely to the competency of the inhabitants of the United States who exercise the liberty to employ. It is a question of the employer's right, and it points to inhabitancy or non-inhabitancy of the employé as the sole test of the employer's right to make the contract of employment, nothing else. Have I, an inhabitant of the United States, purposing to exercise the treaty right, the right to make a contract of employment with a person who is not an inhabitant of the United States? That is the question.

Upon the other side, a multitude of quite different questions might arise, regarding the right of this, that, or the other, or any number of persons to accept employment. Those questions must be resolved not by treaty between Great Britain and the United States, but by those laws which govern the persons who are contemplating acceptance of the employment. If a Frenchman is offered employment by an inhabitant of the United States for the purpose of this industry, he must regulate his conduct by the laws of his country. If a British subject is offered employment, he must regulate his conduct by the laws of his country, and so through the whole range of non-inhabitants. The two questions are quite distinct. The question of what right we, of the United States, have under this treaty to employ non-inhabitants, and the infinite number of possible questions which there may be as to the right of other people of the earth under their laws to accept such an employment.

There is a rather leading case in the United States, which Mr. Justice Gray will recall, the *Terre Haute Railroad* case, which illustrates this. Two railroad companies had made a contract of lease. The question as to the validity of the lease went up to the Supreme Court of the United States, and the Supreme Court held that one of

those companies had, under its charter, corporate power to make such a contract. It held, however, that the other of the companies had not under its charter the corporate right to make such a contract, and declared it invalid. There were two quite separate and distinct questions, which illustrate this question here—the two entirely separate and distinct classes of question which may arise regarding the making of a contract of employment by an inhabitant of the United States with a non-inhabitant in respect of taking part in this fishing industry. This question relates solely to the right under the treaty of the inhabitants of the United States to make a contract with one who is not an inhabitant.

THE PRESIDENT: If you please, Mr. Senator Root, what was the consequence of this decision? Was the right of one of these companies limited by the absence of the right of the other company, or was the absence of the right of one of these companies supplemented by the right of the other?

SENATOR ROOT: In the contract the two rights must necessarily exist to support the contract.

THE PRESIDENT: Yes.

SENATOR ROOT: The right of the company which was acting within its corporate power was full and complete.

THE PRESIDENT: Yes; but could it exercise its right in relation to the other company whose right was defective?

1327 SENATOR ROOT: No.

THE PRESIDENT: No; it could not.

SENATOR ROOT: Not in relation to the other company, but not through any defect of its right.

THE PRESIDENT: Not through the defect of its right, but through the defect of the right of the other.

SENATOR ROOT: It could not make a contract with the other company any more than it could make a contract with a person under the lawful age of contracting, or anyone not *sui juris*. The defect, however, was not a defect of the right. No invalidity was imported into the right of the company which was keeping within its corporate powers.

The practical bearing of this question: It is a mistake to suppose that it relates practically to any prohibition upon the citizens of Newfoundland. There is no such prohibition. It is true that in the recent correspondence Sir Edward Grey made an observation to the effect that he did not suppose that the United States would contend that it had a right to withdraw the citizens of Newfoundland from obedience to their own laws. That was not answered. There was no occasion to answer it, because no such situation arose. No such situation existed, and none has ever existed. Newfoundland never has prohibited her citizens as Newfoundlanders from taking employment upon vessels of the United States. It is curious that the one thing



that our friends upon the other side say the Tribunal ought to decide as incident to the decision of this Question 2 is the one thing that never has arisen to be decided.

Newfoundland has done these things: In the first place (British Appendix, pp. 757 and 758, American Appendix, pp. 197 and 199) she has forbidden any person whatever, of whatever nationality or race, to engage in the crew of any foreign fishing-vessels in the waters of Newfoundland; and on p. 197 of the American Appendix, towards the latter part of the first article, will be found the provisions to which I specifically refer. You see that does not apply to Newfoundlanders specifically. If any person is engaged within that jurisdiction, the vessel is forfeited; and that really was the pivot upon which the subject revolved. The United States vessels had been in the habit of supplementing their crews in order to enable them to take their fish more expeditiously. They had been in the habit of supplementing the crews by picking up men from Nova Scotia. North Sydney was the great shipping place. They also employed these men up on the Newfoundland coast. This statute forbade the shipment on the Newfoundland coast, in Newfoundland waters, of anybody, it made no difference who, and that forced the United States vessels back to these ports in Nova Scotia to supplement their crews. That was, of course, much less expensive than to bring people clear up from the Massachusetts coast, and pay them and feed them during the long voyage up and back. Then Newfoundland put in a provision forbidding any Newfoundlander to leave the colony for the purpose of engaging in foreign fishing-vessels, "which are fishing or intend to fish in the waters of the colony." That is the 7th article of the Act of 1906. That was to prevent their going over to North Sydney and forming a part of the material from which the supplement to the crews was obtained. Still there was no prohibition against the Newfoundlander shipping in an American crew. There was the specific prohibition against his leaving the colony for the purpose of doing it. Any Newfoundlander who had left the colony for any other purpose was entirely at liberty to do it; but for the fact that he would run against another provision, which was not directed against Newfoundlanders, but against British subjects generally.

JUDGE GRAY: I beg pardon, Mr. Root; would you mind repeating that? I did not catch it.

SENATOR ROOT: I say any Newfoundlander was at liberty to ship in an American crew unless he had left the colony for the express purpose of doing it; but for the fact that he would run against another provision of law which was directed against British subjects generally. That is article 6 of the Act of 1906:—

"No person, being a British subject, shall fish in, from or for a foreign vessel in the waters of this Colony."

That it is not a prohibition against Newfoundlanders. It is a prohibition against all British subjects.

1328 JUDGE GRAY: Then Question 2 would seem to have been framed with reference to the provisions of sections 5 and 6 specially?

SENATOR ROOT: No; it was framed for the purpose of meeting a fundamental question, the decision of which would be beneficial in dealing with all these various provisions. Article 6, you see, relates to a general prohibition against British fisheries.

JUDGE GRAY: But not article 5?

SENATOR ROOT: Article 5 relates to a general prohibition against aliens; that is, aliens to Newfoundland, aliens from the Newfoundland point of view. That would take in all Germans, Dutch, French, Portuguese, Italians—everybody in the world except Americans and British subjects; and the provision of article 6 covers British subjects; and the provision to which I referred before, relating solely to the waters of Newfoundland, to shipment in the waters of Newfoundland, covers all the world—everybody.

The only way in which Newfoundlanders are involved in these, apart from that specific provision against leaving the country for the purpose, is by being included in the general category "British subjects."

In dealing with all these various provisions, and in dealing with any number of future provisions which the ingenuity of Newfoundland legislation might devise, and which it would be impossible to forecast, it was manifest, as a preliminary to an intelligent discussion, that we must ascertain whether, quite independently of all these laws, under the treaty the United States vessel owner was at liberty to employ anybody who was not an inhabitant of the United States; because if he is not at liberty to employ anybody who is not an inhabitant of the United States, then we cannot object to any of these things. We cannot discuss them. That lies at the threshold of the discussion of any of these statutes. We cannot call Great Britain to account for making a statute prohibiting British subjects from going into our crews, or fishing from our ships unless the treaty right includes employing non-inhabitants. We cannot call her to account for prohibiting Germans and French and Dutch from fishing from our ships unless, under the treaty, we can employ non-inhabitants. If, under the treaty, we cannot employ a non-inhabitant, we are cut off from discussing any of these questions. And therefore we have put here this preliminary question, asking you to decide it for us, and all these other questions we shall have to take care of, and there will be no serious difficulty about taking care of them, when we come to consider them with Great Britain in the light of whatever your award may be upon the question that is now asked here. And if



there is any danger that your answer to this question may conclude either country upon any one of these other questions, this other great and indefinite range of possible questions relating to the effect of statutes and the right of people to accept employment, why it is perfectly simple, and the only practical way is to say that your award upon this question does not pass upon the effect of any statutes regarding the subjects of any country. That, certainly, is a much more practical way of disposing of the subject than it is to try to decide all these questions, the material for deciding which is not before you, and the reasons for deciding which one way or another have not been argued before you.

Let us pass to the question as we take it to be.

SIR CHARLES FITZPATRICK: Before you leave that, may I ask you a question? I understand you to say that it was not the intention to submit that aspect of the question, that is to say, the aspect with reference to the engagement of Newfoundland fishermen, to this Tribunal?

SENATOR ROOT: Yes.

SIR CHARLES FITZPATRICK: May I ask you, in the light of that statement, to refer to Mr. Whitelaw Reid's letter, on p. 506 of the British Appendix, with respect to the *modus vivendi*, second paragraph:—

“My Government understand by this that the use of purse seines by American fishermen is not to be interfered with, and the shipment of Newfoundlanders by American fishermen outside the three-mile limit is not to be made the basis of interference or to be penalized.”

Then, again, on p. 509, in a letter of the 12th July, 1907, he says:—

“Without dwelling on minor points, on which we would certainly make every effort to meet your views, I may briefly say that in our opinion, sustained by the observations of those best qualified to judge, the surrender of the right to hire local fishermen, who eagerly seek to have us employ them, and the surrender at the same time of the use of purse seines and of fishing on Sunday would, under existing circumstances, render the Treaty stipulation worthless to us.”

1329 Do you think that these paragraphs have any bearing upon your submission?

SENATOR ROOT: I think they are very relevant indeed. They relate, however, to this statute to which I have referred, which forbade Newfoundlanders to go out of the jurisdiction for the purpose of engaging—

SIR CHARLES FITZPATRICK: I do not think my reference is quite sufficiently complete, perhaps.

The first letter of the 6th October, 1906, refers to the Foreign Fishing Vessels Act, 1906, which contains the provision that Newfoundlanders shall not fish in or from an American fishing-boat.

SENATOR ROOT: That Newfoundlanders shall not?

SIR CHARLES FITZPATRICK: Yes; that British subjects shall not.

SENATOR ROOT: Oh! British subjects.

SIR CHARLES FITZPATRICK: They are Newfoundlanders. Newfoundlanders are British subjects.

SENATOR ROOT: Newfoundlanders are British subjects, but—

JUDGE GRAY: But all British subjects are not Newfoundlanders.

SENATOR ROOT: No. You will see this first reference is a reference to the violations of the statute prohibiting Newfoundlanders to leave the jurisdiction for the purpose of engaging in fishing. These fishermen were dependent upon the prosecution of this American fishing enterprise for their livelihood; and they were cut off from engaging, within the territorial jurisdiction, in common with everybody else in the world; and accordingly they rowed out, by the hundreds, in boats, across the 3-mile limit, to engage with the American fishermen outside of the jurisdiction. Then this statute is put in, penalising their going out for the purpose of making that engagement. That is what this refers to. And the second reference—

SIR CHARLES FITZPATRICK: So that, in your construction, in that letter it is asked that the Foreign Fishing Vessels Act should be suspended for the protection of Newfoundlanders, and not for the protection of American fishermen.

SENATOR ROOT: It is to be suspended, certainly, for the advantage of American fishermen. It was to relieve American fishermen from the very great disadvantage which was imposed upon them by the fact that the men whom they wanted to employ would be punished if they accepted employment within the jurisdiction of their country, and would be punished if they left the country for the purpose of accepting such employment.

THE PRESIDENT: Was it understood, Mr. Root, by both parties, that Question 2, as it is now framed, excluded the consideration of the right of Americans to employ Newfoundlanders in their fishing industry, and of the right of Newfoundland to prohibit Newfoundlanders to enter that service?

SENATOR ROOT: I would not say so. I think the understanding of the question—I am a little embarrassed in answering this, because I cannot answer it as counsel. My own past relation to it is such that I, perhaps, ought to have Mr. Bryce here to join with me in answering it; but I will go so far as this: That I do not think it entered into the mind of anyone that the answer to this question disposed of any question relating to the acceptance of employment by Newfoundlanders or by British subjects, or by people of any other nation dependent upon the statute of any other countries; that it related solely to the competency of the American making his side of the contract under the treaty.



SIR CHARLES FITZPATRICK: What would be the meaning of the words used by Mr. Reid in his letter of the 12th July, 1907, "that the surrender of the right to hire local fishermen . . . would, under existing circumstances, render the treaty stipulation worthless to us"?

On the face of that letter, does it not rather imply an intention to make that a condition of the reference?

SENATOR ROOT: Will your Honour give me the page?

1330 SIR CHARLES FITZPATRICK: Page 509 of the British Appendix.

In the very next paragraph he goes on to say:—

"My Government holds this opinion so strongly that the task of reconciling it with the positions maintained in your letter of June 20th seems hopeless."

SENATOR ROOT: May I call your attention to another feature of the fourth paragraph? What Mr. Reid says is:—

"in our opinion, sustained by the observations of those best qualified to judge, the surrender of the right to hire local fishermen, who eagerly seek to have us employ them, and the surrender at the same time of the use of purse seines and of fishing on Sunday would, under existing circumstances, render the Treaty stipulation worthless to us."

SIR CHARLES FITZPATRICK: He put the three things together there.

SENATOR ROOT: The prohibition against the use of that kind of implement which was appropriate to the vessel fishery, and could be used by the crews without having a great number of supplementary men; and, at the same time, the prohibition of the employment of these supplementary local fishermen, whether Newfoundlanders or not, amounted to a foreclosing of them from the profitable exercise of that industry. But that does not import into this Question 2 any questions regarding any of the obstacles that had been introduced to prevent local fishermen from engaging with us.

As to that part of the question which both sides agree is here: Whether it is competent under the treaty for an American prosecuting this fishing enterprise to employ and send to the waters of the treaty coasts as parts of the fishing crew persons who are not inhabitants of the United States; and laying entirely aside, not undertaking to consider, whether the persons are unwilling or unable to accept the employment, but assuming a willing and a competent contractor on the other side, is the American owner of the fishing enterprise competent under the treaty to make the contract on his side?

SIR CHARLES FITZPATRICK: Perhaps you will allow me to say there would be no personal disqualification, except the fact that he is not an inhabitant.

SENATOR ROOT: Exactly; there would be no personal disqualification, except the fact that he is not an inhabitant—that being a qualification arising or not arising under the treaty.

SIR CHARLES FITZPATRICK: Under the treaty.

SENATOR ROOT: And therefore something going to the employer's right.

We are all agreed that this is an industrial enterprise, I think. There certainly cannot be any question about it, in view of that fundamental British statute of 1699 (British Case Appendix, p. 525), which opens its provisions by reciting:—

“Whereas the trade of and fishing at Newfoundland is a beneficial trade to this kingdom, not only in the employing great numbers of seamen and ships, and exporting and consuming great quantities of provisions and manufactures of this realm, whereby many tradesmen and poor artificers are kept at work, but also in bringing into this nation, by returns of the effects of the said fishery from other countries, great quantities of wine, oil, plate, iron, wool, and sundry other useful commodities, to the increase of His Majesty's revenue, and the encouragement of trade and navigation; Be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That from henceforth it shall and may be lawful for all His Majesty's subjects residing within this his realm of England, or the dominions thereunto belonging, trading or that shall trade to Newfoundland, and the seas, rivers, likes, creeks, harbours in or about Newfoundland, or any of the islands adjoining or adjacent thereunto, to have, use, and enjoy the free trade and traffic, and art of merchandise and fishery, to and from Newfoundland,” &c.

There is an industrial enterprise vastly important to the country, to the nation, which is authorising its subjects to engage in it.

In the second place, it appears beyond dispute that it was the universal custom to employ aliens as well as citizens of the country in which the vessel was owned in such enterprises. That cannot well be disputed, in view of the other British statutes which are here. For example, the British statute of 1663, which is in the British Counter-Case, Appendix, at p. 213, and which provides, in article 16:—

“And for the Encouragement of the Herring and North-Sea Island, and Westmoney Fisheries, (2) be it enacted, and it is hereby enacted by the Authority aforesaid, That from and after the 1331 first Day of August which shall be in the Year of our Lord one thousand six hundred sixty and four, no Fresh Herring, Fresh Cod or Haddock, Coal-fish or Gull-fish, shall be imported into England, Wales, or the Town of Berwick, but in English-built Ships or Vessels, or in Ships or Vessels *bonâ-fide* belonging to England, Wales, or the Town of Berwick, and having such Certificate thereof as is abovesaid, and whereof the Master and three Fourths at the least of the Mariners are English, and which hath been fished, caught and taken in such Ships or Vessels.”



And the Act of 1775, in the British Appendix at p. 543, provides in the first article for the payment of bounties to vessels which—

“shall appear by their register to be British built, and owned by His Majesty’s subjects residing in Great Britain or Ireland, or the islands of Guernsey, Jersey, or Man; and be of the burthen of fifty tons or upwards, and navigated with not less than fifteen men each, three-fourths of whom, besides the master, shall be His Majesty’s subjects.”

You see the stress is laid upon the ownership of the vessel, and the construction of the vessel. It must be British built and owned by His Majesty’s subjects. But the crew are required to be three-fourths subjects of His Majesty; of course, permitting one-fourth not to be, and showing quite clearly the custom which made it necessary to put such a restriction upon them, the custom which might have made a far greater proportion of the crew composed of aliens to Great Britain but for the restriction.

The Attorney-General quite frankly concedes the custom, and he says they have to do it; that the conditions of the British marine all over the world make it necessary. They have to employ Lascars and so on. That but sustains our position. Of course there are reasons; there are always reasons; there were reasons here that must have been in the contemplation of the people who made the treaty of 1783 and those who made the treaty of 1818, that this kind of an enterprise, pursued and carried on by means of vessels fitted out and sent from a great distance would be carried on through the employment not merely of natives of the country from which the vessels came, but the employment of crews in the ordinary way, which took in these sailors who are floating all over the world, and the men who can be collected in the port from which the vessel comes and the ports at which the vessel touches. The ordinary, universal usage must be supposed to have been in the minds of the parties making the conventions, and the terms of the conventions must be read with reference to the existence of such a usage. Indeed, there is quite a distinct admission by Sir Edward Grey that, so far as crews are concerned, it is not contended by Great Britain that the crews of the vessels may not be partly aliens. But they make the distinction that a man shall not pull a fish out of the water, and shall not take hold of a net. There is no basis for the distinction. These industrial enterprises were carried on by the servants who were partly English and partly aliens. As my learned friend the Attorney-General says [p. 1058, *supra*]:—

“We do not forbid the employment of foreigners, because that would be in particular cases to handicap an industry.”

He thinks Newfoundland may employ foreigners.

THE ATTORNEY-GENERAL: I hope my learned friend will not put that as a statement of mine. I said we did not forbid the employ-

ment of foreigners, but I was speaking of the commerce of Great Britain generally. I distinguished between these statutes that dealt with our general commerce and statutes which, like those referring to Newfoundland, are dealing with a particular trade, in which only a particular class of foreigners is entitled to be engaged. The learned Senator is putting what he calls my admission to a purpose to which I never applied it. I drew a distinction between the general trade of shipping over the whole world and the particular industrial right exercised in this particular part of the world, which is not an industry at all, but a mere right in an industry.

SENATOR ROOT: I quite agree with the Attorney-General in the limitation which he has stated. I am talking about the same thing he was talking about. I am talking about the general right of employment. I shall speak hereafter as to the question whether there is any particular ground of exception from that general right. I hope the Attorney-General will realise that I was not intending to impute to him any observation regarding this particular instance. I was establishing the existence of the general practice of employing foreigners.

The Attorney-General says [p. 1058, *supra*]:—

“He (Mr. Elder) wants to show, of course, that in 1818, when there is a right given to take fish, that according to the custom of that time that right was exercised, not by Britons for themselves alone, but by Britons employing foreigners. Well, he does not show it. He does show this, that according to the law in Asia and in Africa and in different parts of the world, Britons were allowed to employ on their ships a certain proportion of foreigners.”

That is the proposition to which I refer. And he says:—

“I am afraid, in those days, when maritime troubles or naval wars came on, we were not very particular about the nationality of those whom we impressed, but still we did not want those, of course, who could not be trusted to fight in our interests, so we did not discourage the system of foreign seamen in England, if it was found convenient for their employment. So that you see here where we say three-fourths of them must be British subjects, we did not say the other fourth may be foreigners. We do not forbid the employment of foreigners, because that would be in particular cases to handicap an industry. But, we say each vessel must be fitted out at a British port, and you are not likely at a British port to get any foreigners, except those who are inhabitants or domiciled in England.”

I make this observation upon that: that we have just as much right to say that you cannot take this industry out of the general and universal practice and make it an exception for the purpose of handicapping it, as the Attorney-General has to explain that they do not prohibit the employment of foreigners in other particular cases because that would be to handicap an industry. It is very well to refrain from handicapping British industries by not making them



exceptions to the general rule. But we object to their handicapping our industry by making it an exception to the general rule.

The next proposition is that, in the conduct of an enterprise for profit, servants and agents may be employed to act with and for the proprietors, owners of the enterprise. That is the lesson taught by this statute of 1699 which is at p. 525 of the British Case Appendix, and which provides in the first article that it may be lawful—

“for all His Majesty’s subjects residing within this his realm of England, or the dominions thereunto belonging, trading or that shall trade to Newfoundland, and the seas, rivers, lakes, creeks, harbours in or about Newfoundland, or any of the islands adjoining or adjacent thereunto, to have, use, and enjoy the free trade and traffic, and art of merchandise and fishery, to and from Newfoundland, and peaceably to have, use, and enjoy, the freedom of taking bait and fishing in any of the rivers, lakes, creeks, harbours, or roads, in or about Newfoundland, and the said seas, or any of the islands adjacent thereunto, and liberty to go on shore on any part of Newfoundland, or any of the said islands for the curing, salting, drying, and husbanding of their fish, and for making of oil, and to cut down woods and trees there for building and making or repairing of stages, ship-rooms, train-vats, hurdles, ships, boats, and other necessities for themselves and their servants, seamen, and fishermen, and all other things which may be useful or advantageous to their fishing trade.”

Here is a law which limits the privilege of fishing in Newfoundland waters “to His Majesty’s subjects residing within this, His realm of England, or the domains thereunto belonging.” The right is limited to them. The right is to be exercised through the use of vessels and implements which, according to universal custom, may be handled by servants, seamen and fishermen, and part of whom are not subjects of the realm of England, and who, therefore, have themselves no right under the treaty; and this statute makes express provision for the going ashore and engaging in this business of fishery by servants, seamen and fishermen.

Manifestly, there, the servants, seamen and fishermen are not going under their own right. They are going under the right of the vessel owner, the liberty of the class to whom the right is given. No rights are given to the servants, seamen and fishermen, and when they are permitted to engage, as they are permitted by this statute, in the fishery business, they are not exercising any right of theirs; they are acting as the hand of the British subject who has the right to carry on the fishing industry. It is quite independent of any right of their own. They would need no right of their own. It is his right that qualifies them to be there.

A similar result follows from the statute of 1775 relating to a different kind of fishing or quasi-fishing industry. That is at p. 543 of the British Appendix. If the Tribunal will turn to articles 10 and 11, on p. 545, the following will be observed:—

"And it is hereby further enacted by the Authority aforesaid, That from and after the first Day of September, one thousand seven hundred and seventy-five, it shall and may be lawful for any Person or Persons to import into this Kingdom any raw and undressed Seal Skins taken and caught by the Crews of Vessels belonging to and fitted out either from Great Britain, Ireland, or the Islands of Guernsey, Jersey, or Man respectively, and whereof the Captain or Master and Three-fourths at the least of the Mariners are his Majesty's Subjects, or by Persons employed by the Masters or Owners of such Vessels, without paying any Custom, Subsidy, or other Duty, for the same, any Law or Usage to the contrary notwithstanding."

The Tribunal will see that contemplates the employment of persons who, themselves, have no right granted to them. Then, article 11 reads:—

1333 "Provided always, That nothing in this Act shall extend, or be construed to extend, to give Liberty of importing any such Seal Skins Duty-free, unless the Captain or Person having the Charge or Command of such Ship or Vessel importing the same shall make Oath before the Collector or other Principal Officer of the Customs at the Port of Importation (who is hereby authorised and required to administer such Oath), that all the Skins imported in such Ship or Vessel were really and *bona-fide* the Skins of Seals taken and caught by the Crews thereof, or by Persons employed by the Master or Owner of such Ship or Vessel, or of some other Ship or Vessel qualified as aforesaid."

It is the qualification of the vessel, and the privilege is given quite irrespective of the nationality of the persons employed, except that it is required that three-fourths of the crew, three-fourths of the mariners, shall be English. One-fourth may be aliens to England. And the qualified vessels, qualified by having three-fourths of their mariners English, and by belonging to or being fitted out in Great Britain, carry along with them the right of having the benefits of the Act, though the taking is done by a crew one-fourth of which may be aliens, or done by anybody who comes in the class of persons employed by the master or owner of such ship or vessel. And this is a great fishing statute, this Act of 1775. This is the same statute the seventh article of which relieves all vessels fitted and cleared out as fishing ships to be employed in the Newfoundland fishery from any restraint or regulation with respect to days or hours of working.

Now, to the same effect were these cases which were cited, the *Duchess of Norfolk Case*, and *Wickham v. Hawker*, in 7 Meason & Welsby Reports.

There the question was regarding a right granted to Lord Seymour in one Case and to one of the parties in *Wickham v. Hawker* in the other, a right granted for hunting for profit—whether persons who had not the right could come in and take part as servants of those who had the right; that is, persons not sailing under their own flag,



sailing under the flag of the grantee of the right, but who were not qualified themselves personally. The decisions settled the law of England that they could.

My friends on the other side, in their Argument, quite covered up the real point of these decisions, and the real point to which those statutes are cited, which is, that while the right is granted to one class of persons it may be exercised for them by employees who themselves have no right whatever, but who are coming in and acting under the right of their employer.

The President called attention to a similar characteristic in a Delaware statute or a Maryland statute which was referred to some time ago. There was a prohibition against fishing, except by citizens of the State. When somebody came with a vessel to fish the requirement was that the master should make an affidavit, and what he had to swear to was that the vessel was fishing in the interests of the citizens of the State. He did not have to swear that the men who were doing fishing were citizens of the State, but that the vessel was fishing in the interests of the citizens of the State. It carries that same idea, you see.

My learned friend, the Attorney-General, has exhibited great disquietude lest we should flood the coasts of Newfoundland with Orientals. He apprehends that the United States fishing-vessels will stop in the various Oriental countries that intervene between Passamoquoddy Bay and Newfoundland and will collect great hordes of Mongols and, to use his own words, will inundate the waters of Newfoundland with them. He fears that we will make of the treaty waters "multitudinous seas incarnadine" with Chinamen. Perhaps his view is that these fishing-ships, these little bits of fifty or sixty, or one-hundred-ton boats may sail away ten thousand miles to the other side of the globe and collect Asiatics to come and fish on the coast of Newfoundland.

I cannot really think he was serious about it, but sometimes, particularly when treating of Far-Eastern matters, we are apt to fail to appreciate the true effect of what may be said. Yet I prefer to believe that my learned friend, who has a very pretty wit, was really playing with us a little about the danger of inundation by Orientals, particularly in view of the fact that he contended that it was all right for the Newfoundlanders to employ them themselves—no objection to that seems to exist. They may be allowed to come ashore and enter into the life of the country and mingle with the people of the country, but, when there is a possibility of our bringing some unfortunate Chinese laundryman there on a fishing-vessel, we are to be regarded as making a sort of gurry ground of the coastal waters for the disposal of Mongols.

There is only one further subject regarding Question 2 that I care to speak of:

Something was said about the presentation of a certificate by anybody coming there to exercise this right, saying he is an  
1334 inhabitant of the United States. That occurred during the course of the discussion by Mr. Elder upon the kind of papers which a vessel should produce.

I merely wish to guard against its being taken to apply to individuals, as distinct from people coming upon vessels, and exhibiting the documents of the vessels.

Of course when any right, any general right is granted to a country to have its subjects or citizens, or inhabitants have rights or privileges in another country, the presumption always is that any of the class specified as the class for the benefit for which the right is granted, are entitled to exercise it. If there is to be a prohibition or limitation why that must be stated, and in the absence of any express prohibition or limitation upon the part of the country to which the class belongs, the intent of the grantee of the right must be presumed to be that all of the class shall exercise it.

I will pass to Question 3.

“Can the exercise by the inhabitants of the United States of the liberties referred to in the said article be subjected without the consent of the United States, to the requirements of entry or report at custom-houses, or the payment of light, or harbour, or other dues, or to any other similar requirement, or condition, or exaction?”

First, as to the requirement of entry or report at custom-house. Those are two very different things. The Attorney-General was not inaccurate in stating that the paper to be signed would not differ very much in one case from the paper which might well be signed in the other case, but “entry” and “report” are two quite distinct things.

I think it is quite appropriate that a vessel going upon the treaty coast, and intending to claim the treaty right, should declare herself; that if the place where she purposes to exercise the right is a place where there is a custom-house, or any officer qualified to receive a report, she should make it; or if, without interfering with the exercise of the right, passing a custom-house or a place where there is an official, she can make the report, that she should make it. That is quite reasonable. I should take very kindly to a class of regulations such as we have illustrated under the British Treaty with France of 1839. If I remember correctly, there were a series of regulations prepared a few years after that treaty. Under the North Sea Convention of 1882, and many other conventions, vessels are obliged to carry numbers plainly displayed. You can see the numbers up here in the fishing port of Scheveningen. I believe they have a sort of



special flag or vane that they carry, something to identify. I quite agree that it is a reasonable, sensible thing that vessels going to the coast of another country to exercise a right under a treaty should identify themselves in some appropriate way, and indicate in an appropriate way to the authorities of the country who they are, and what they are, and what they are there for, and what the rights are that they propose to exercise. We will not quarrel about that. I do not think there is really much difference between the counsel on the two sides in this respect.

But I want to emphasise the distinction between "report" and "entry," because a failure to observe that might lead to unintended results.

The entry of a vessel is the transaction, the process by which a vessel carries itself and its merchandise across the line of exclusion of a country; quite a different thing from a report. It is the process by which it acquires a right to have the merchandise, the goods that it brings, enter into the general stock of merchandise of the country, upon payment of whatever dues and exactions the laws may impose.

The laws relating to entry in Newfoundland, in Canada, all the laws all over the world, relating to the entry of vessels, are designed to regulate that process, and they are not applicable to vessels that do not go through the process. These vessels never really do get into the country at all. These fishing-vessels never get into Newfoundland. They never pass that invisible line which makes the distinction between what is in Newfoundland and what is out of Newfoundland, what can be dealt with as being part of the general stock of property in Newfoundland, and what cannot be. And imposing upon our fishing-vessels the steps of that process is quite unnecessary, quite inappropriate, and might lead to consequences that nobody has ever contended for at all. It is agreed and expressly conceded that there is no right to impose duty upon articles which may be upon these fishing-vessels. Subjecting them to entry would carry an implication that the articles that they had on board, being carried across that line, became subject to duty. I especially ask the attention of the Tribunal to guard against making any award under this question which might possibly give rise to an idea on the part of anyone hereafter that the process that has taken place justifies the exaction of duties, and might lead to the exaction of duties upon the material or articles upon these vessels.

1335 SIR CHARLES FITZPATRICK: A vessel that calls at a port for orders, as I understand it, Mr. Root, merely reports; it makes no entry?

SENATOR ROOT: I understand so.

SIR CHARLES FITZPATRICK: It simply reports its presence there.

SENATOR ROOT: Clearly that is all. We have here an illustration. Under this so-called *modus* with Canada of 1888, the *modus* which has worked so well that we have gone on under it for twenty years without trouble, provides that no entry or clearance shall be required of any fishing-vessel which enters Canadian ports for shelter, repairs, wood, or water, if the vessel does not remain more than twenty-four hours, provided they do not communicate with shore.

Now, there is a practical illustration of the distinction which is made.

THE PRESIDENT: Do I understand well, Mr. Root, that "report" is something like the delivering of a statement for the identification of the vessel, and its loading, whereas making an entry is applying for admission for intercourse?

SENATOR ROOT: That I understand to be the distinction.

SIR CHARLES FITZPATRICK: The President said report the "loading."

THE PRESIDENT: What she had on board.

SIR CHARLES FITZPATRICK: Does not "report" mean merely reporting the fact of the presence of the ship in the port, pure and simple?

SENATOR ROOT: That is the ordinary scope of "report." I should think that the kind of report which ought to be made here would be to report the presence of the ship, and American fishermen on the ship to exercise the treaty right under the treaty, and having on board articles appropriate to the exercise of the right.

JUDGE GRAY: And no other; to identify her as not a trading vessel.

SENATOR ROOT: Precisely. I do not want any inferences to be drawn, however, that will affect Question 7.

THE PRESIDENT: And "entry" has to do with the admission into intercourse on the land?

SENATOR ROOT: Precisely. You see, if "entry" means anything more than "report," it is quite unnecessary, for "report" does everything that is requisite.

Now the second question under that head: Can an American fishing-vessel be subjected, without the consent of the United States, to the payment of light, harbour, or other dues?

First let me ask your attention to the question of strict right. What is the justification for the exaction of light or harbour or other similar dues from any vessel that comes into the territorial waters of a country? What is the basis of right? There must be some basis of right creating an obligation, of course. Civilised countries do not take property away from aliens who come. If they require aliens to hand over their money when they come into the territory, in these civilised days, they do it upon the theory that there is an obligation on the part of the alien, that he owes the money, always. It must be so, otherwise we go back to the dark ages.



Now, what is the basis of obligation upon which anywhere ever a country requires an alien coming with his ship into the territory of the country to pay money under the name of light dues or harbour dues? Why, it can be only that the requirement is a condition upon the exercise of the privilege.

SIR CHARLES FITZPATRICK: Not exclusively; the result of a creation of a convenience, for instance?

SENATOR ROOT: But that is involved. I mean to include that.

SIR CHARLES FITZPATRICK: Yes.

SENATOR ROOT: That is in the privilege. The obligation arises from the fact that the ship has come there to enjoy the privilege. It arises from the voluntary act of the ship coming to enjoy the privilege. But when a ship comes into the waters of a country other than its own to exercise a liberty that generations ago was granted to its country, and paid for it by its country, the other country 1336 cannot exact a second time a payment for the enjoyment of the privilege. That ship is not beholden to the country into whose waters it goes for the enjoyment of any of the privileges there. It takes the right to enjoy the privilege there from its own country under the right that its country long before acquired, and paid for, in the consideration of the treaty which granted it. And you cannot predicate any obligation upon that ship under those circumstances.

As Mr. Lansing suggested the other day, when we were speaking of this subject, it is as if one man were to grant to another a right of way over his land, and then were to put up a toll-gate and charge him toll for passing over the way; and do it upon the excuse or for the alleged reason that he had improved the road. It is a privilege of the man who has the right to pass over the way to say whether the way shall be improved at his expense or not, and a new charge for the privilege of using the way already granted cannot be imposed upon him without his consent.

Now, all these statutes cited by Great Britain are merely statutes which fix, determine, what the obligation of vessels coming in to exercise the privilege shall be. They determine the exaction that shall be made. They are merely the merchant fixing the price of the goods on his shelves which shall be charged to the customers that come in. They have no relation at all to determining whether ships that are not subject to any obligation shall be subjected to it. They have no bearing at all upon the question whether a vessel coming in for the exercise of a right already granted to its country, shall be required to pay again for the exercise of the right. They tell what the vessel shall pay if it is bound to pay. They regulate the exactions, but that is all that there is to them. Of course they are couched in general terms because the legislatures of these States and colonies in

passing their laws and fixing their light dues, and so on, are not studying the treaty of 1818.

I have been considering this as if there were no question of discrimination. I do not think there is any strict right—any lawful right to exact against our will these dues from us, whether there be discrimination or not; but I have one observation to make upon the position taken by my learned friends on the other side, as to discrimination.

Their view is that although the statutes of Newfoundland do not impose these light dues upon their own fishing-vessels, nevertheless that is not a discrimination, because they say all citizens of Newfoundland have paid taxes. Newfoundland is supported they say by a system of indirect taxation, and every citizen of Newfoundland pays his share.

Now, what does happen when light dues are imposed by legislation? Why, either the Legislature making the law fixes a scale of dues sufficient to pay the whole expense, or it apportions the expense in a way which it deems to be equitable and reasonable between the country at large and the owners of the ships, so that that part of the burden shall be borne by the country which is proportionate to the benefit the country gets to its commerce its prosperity, and wealth, and that part of the burden shall be borne by the shipowners which is appropriate to the special benefit the shipowners get, and the two are quite distinct things.

Many countries take the entire burden. Canada, for example, takes the entire burden. She charges no light dues. She goes so far as this: that among the lighthouses along this rocky coast about the Straits of Belleisle, Canada, on Newfoundland's territory, maintains, I think it is seven, of the lighthouses at her own expense for the benefit of her transatlantic steam-ship service. There the benefit to the country is deemed so great that she maintains her own lighthouses without charging the vessels anything, and even maintains lighthouses on the shores of the other colony.

Now, when there is an apportionment of the burden, the citizen of Newfoundland who pays through this system of indirect taxation by paying a little higher price for the things that he uses, who pays his share of the burden that is covered by general taxation, is not paying any share of the other burden that it casts specially upon the ships. They are two quite different things, and when he is exempted from his share of the burden that ought appropriately to be defrayed by the ships, he is exempted from something that is not made up for by his having to pay his share of the burden commensurate with the benefit which his country gets and which he gets as a citizen of the country. One man lives in Gloucester, Massachusetts, and owns a fishing-vessel that comes to the Newfoundland coast; another man



lives in St. John's, Newfoundland, and owns a fishing-vessel that comes to the same coast; if one of them is exempted and the other is charged, there is a discrimination that is not made up by the fact that the Newfoundland man has paid his share of the benefit that his country gets. The Gloucester man has not got any part of the benefit, and therefore he has paid no part of it; but the Gloucester man 1337 and the St. John's man both get a special benefit for their vessels, and if the St. John's man is exempted from it there is a discrimination in his favour and against the Gloucester man.

Now, that leads me naturally to the further question not of strict right, but whether it is quite reasonable for us to insist on our right not to pay for these privileges. Upon that the fact that the fishing-vessels of Newfoundland are exempted and that under this old British statute fishing-vessels were exempted is very cogent. The fact is that these little fishing-vessels ought not to have to pay for the burden created for the benefit of commerce. They feel along the coasts, they know the ground, they have but little use for lighthouses, they have no use for port privileges, and this provision of the statute of Newfoundland which exempts her fishing-vessels and coasting-vessels is an expression of the real common-sense of things, and our position, quite apart from the strict, technical, legal right, is that common-sense ought to be exercised for our benefit, as well as for the benefit of her own vessels.

Passing to Question 4, it is as follows:—

“Under the provision of the said Article that the American fishermen shall be admitted to enter certain bays or harbors for shelter, repairs, wood, or water, and for no other purpose whatever, but that they shall be under such restrictions as may be necessary to prevent their taking, drying, or curing fish therein or in any other manner whatever abusing the privileges thereby reserved to them, is it permissible to impose restrictions making the exercise of such privileges conditional upon the payment of light or harbor, or other dues, or entering or reporting at custom-houses or any similar conditions?”

You will perceive that that is a much narrower question. It relates solely to the right, under the treaty, to impose such restrictions as may be necessary to prevent the taking, drying, or curing of fish, or in any other manner whatever abusing the privileges reserved. It does not trench upon this ground that I have been discussing under Question 3. It does not involve, or relate, in any manner whatever to, any general rights to impose light or harbour dues. It relates solely to the exercise of the power to impose restrictions necessary to prevent the taking, drying, or curing of fish, or other abuse of the privilege of entry.

What I have said about the reasonableness of a vessel declaring itself, reporting where there is somebody to report to, and about such regulations as those regarding a special flag, or bearing a number,

things designed to prevent concealment or evasion, applies here to restrictions necessary to prevent drying, taking, and curing fish, and to prevent abuse. What I have said about entry applies also.

SIR CHARLES FITZPATRICK: Do you think so?

SENATOR ROOT: I should think so.

SIR CHARLES FITZPATRICK: You are in touch with the land here. You are constantly going to and from your ship to the land.

SENATOR ROOT: I quite agree that special regulations are appropriate to govern that intercourse with the land.

SIR CHARLES FITZPATRICK: Repairs involve a great deal.

SENATOR ROOT: I do not think that the way to deal with it is to apply these statutes that are meant to apply to an entirely different thing. It is like a man trying to lend somebody else his clothes, and they do not fit.

SIR CHARLES FITZPATRICK: A smuggler wears a great many different garments.

SENATOR ROOT: Quite different statutes are intended to deal with smugglers from those intended to deal with vessels that come to the custom-house and make entry. They are statutes relating to a lawful proceeding while your smuggling statutes are quite different. I quite agree that there are many provisions of smuggling statutes—statutes that are intended to be side-lines, to prevent ships from straying off, from wandering over the pasture, and to make them come into the custom-house if they are going to bring any goods in—that furnish illustrations of regulations which would be quite appropriate, and the provision of the 1888 *modus* in Canada, which I have just referred to, indicates that. That is that they need not enter or clear.

SIR CHARLES FITZPATRICK: That is where they come in for shelter. But my difficulty has reference to their conduct when they come in for repairs. Repairs involve close contact with the land.

1338 SENATOR ROOT: They do not involve taking anything into the country; they involve getting something out.

SIR CHARLES FITZPATRICK: Not always.

SENATOR ROOT: And they call for quite a different set of regulations. At all events, I am not disputing that—

SIR CHARLES FITZPATRICK: There will be some different provision required in this case.

SENATOR ROOT: I quite agree to that. I do not for a moment want to have a conclusion which will enable Americans to go up there and really abuse the privilege, as I have no doubt that sometimes they do.

SIR CHARLES FITZPATRICK: You see St. Pierre, Miquelon, is so convenient.

SENATOR ROOT: Yes, undoubtedly, but I will leave the British Government to deal with its French ally on that subject.



Now, on the subject of light and harbour dues, these are no restrictions at all. It is perfectly plain that they cannot be imposed under this question, because they do not come within the purview of this renunciation clause. There is nothing in requiring a man to pay light, or harbour, or any other kind of dues, which tends in any way to restrict the taking, drying, or curing of fish, or to prevent the abuse of privileges; unless it be upon the theory, which sometimes happens in domestic affairs, that by taking a man's money away from him you may keep him from going off and getting into trouble. There is no other conceivable way in which the exaction of this money from the master of an American fishing-vessel can be deemed to come within the terms of the treaty which provides for making him subject to "such restrictions as may be necessary to prevent their taking, drying or curing fish therein, or in any other manner whatever, abusing the privileges thereby reserved to them."

I wish to make one observation about both Questions 3 and 4. Whatever may be required in the way of report, declaration, identification, or, on the non-treaty coast, regulation of intercourse with the shore, should be of course, of such a character as not to prevent the exercise of the treaty right. We made very serious objection to some provisions of this Act of 1905 of Newfoundland, objections to which the British Government gave their practical assent. The provisions objected to in form, were directed solely to the prevention of something which, very likely, they had a right to prevent; that is certain trade transactions, the purchase of fish, or the purchase of nets and implements of fishing which, I say, very likely, they had a right to prevent. I put in "very likely" because it might depend upon your decision under Question 1, and I do not want to ignore that. But those provisions to which I refer in the Act of 1905, while directed only to the prevention of certain trade, authorised the local officer to go on board of any fishing-vessel, take it into port, take it away from the fishing ground, subject the master to examination and the vessel to search for the purpose of ascertaining whether he had on board any fish, or fishing gear, the purchase of which was prohibited, and whether he had purchased any fish or fishing gear, and provided that the presence of any fish or fishing gear on board should be *primâ facie* evidence that he had purchased it. Those provisions, though directed to the enforcement of a statute which I am not now contesting the right of Newfoundland to make, were provisions which plainly interfered with and prevented the exercise of the fishing right, because they took the ship away and put it in a position where it might be impossible to prevent it from being condemned, and made the mere presence upon the ship of the very things which the ship was entitled to have on board as a result of its fishing enterprise, the implements which

it was entitled to have to carry on its enterprise, a condemnatory fact. Anything of that kind should be avoided in any provision relating to the conduct of these vessels under Question 3 or Question 4.

SIR CHARLES FITZPATRICK: Have you looked at the regulations applicable to the North Sea fisheries?

SENATOR ROOT: I have run my eye over them.

SIR CHARLES FITZPATRICK: Can you not find something there which would be useful?

SENATOR ROOT: It is quite probable, and you will remember that there was not any real difficulty in settling upon those regulations with Canada, and unless some disputed question of the basis of right comes in I should think there would be no difficulty.

SIR CHARLES FITZPATRICK: You see Newfoundland has a pretty extended coast line to look after.

SENATOR ROOT: Undoubtedly, and I do not blame them for wanting to be pretty careful.

SIR CHARLES FITZPATRICK: Do you think there is any very serious objection to applying the same liberal spirit that you have manifested in connection with Questions 3 and 4 to No. 2? Is there anything to be gained by leaving this question of the employment of Newfoundland fishermen to uncertainty?

SENATOR ROOT: Sir Charles, my difficulty about that is that when you come to pass on the question of the effect of these statutes, you have to consider them in reference not to the question in No. 2; that may be a necessary preliminary to the consideration of them; but you have to consider them specifically in reference to the question in No. 1.

SIR CHARLES FITZPATRICK: I am presupposing that is out of the way.

SENATOR ROOT: We have not presented that aspect of these statutes. We have not presented these statutes at all. We have not presented the relation between these statutes and the principles that will be involved in your award undoubtedly under Question No. 1. We have not argued them, or put them in our Case, or our Counter-Case, or our written Argument.

SIR CHARLES FITZPATRICK: It is exactly my embarrassment that you have submitted all the statutes except the statute of 1906, so that that question might arise hereafter. That is where the difficulty is.

SENATOR ROOT: That was omitted from the enumeration of the statutes because its effect has been suspended.

SIR CHARLES FITZPATRICK: When it comes into force the question arises. What advantage is there to be derived from keeping open that difficulty when we want to settle all the difficulties?



SENATOR ROOT: I know. It is merely that we did not intend to submit any question arising from the effect of these Newfoundland statutes on the persons at whom they were directed, and we did not present the material for it in the Case, in the Counter-Case, or in the printed Argument. We have not argued it here, and the questions that will arise when we have disposed of this question of inhabitancy may be very serious questions, dependent upon what your award is under No. 1; and they ought to be studied, the material relevant to them ought to be presented if they are to be decided, and they ought to be argued if they are to be decided. Counsel occupy a little different position from the head of a Foreign Office dealing with this subject. Our warrant here is only to present these questions. We are here not to present new questions, but we are here with authority only to make oral argument before this Tribunal within the limits of the questions that were stated. I think that perhaps if we were now to go back again to the making of the special agreement, we might possibly make some sort of an agreement classifying these statutes, and submitting an eighth, or another, question in relation to the effect of local statutes upon the citizens of the British Empire, or of the locality, and present it, with the material relating to it and argue it. But, as it is, our warrant is to argue these questions, and, of course, the jurisdiction of the Tribunal is to decide these questions, and I do not think we can go beyond it.

SIR CHARLES FITZPATRICK: When will the statute that has been suspended because of this reference go into effect?

SENATOR ROOT: That is a question that I cannot answer.

SIR CHARLES FITZPATRICK: You understand the spirit in which I put these questions to you?

SENATOR ROOT: Certainly I do, and that is why I said that perhaps if we were meeting together now and making a new agreement we might devise some form classifying the various questions liable to arise on the other side of the shield relating to the effect upon citizens of other countries of the statutes of their own countries. If 1340 we had done so we would have presented a question relating to it, would have presented the material bearing upon it, and would have argued it; but we did not.

THE PRESIDENT: Is not Question 2 framed in quite a general way, so that we are asked whether the inhabitants of the United States have a right to employ as members of the fishing crews of their vessels every kind of persons not inhabitants of the United States?

SENATOR ROOT: I think not. I think it is the right to employ any persons.

THE PRESIDENT: It is persons not inhabitants of the United States. Is not that to be understood as every kind of persons? There is no distinction between the different categories of non-inhabitants.

SENATOR ROOT: I think the limitation comes from two things: the fact that the question relates to the competency of the employer solely, and to the existence or non-existence of the status of inhabitancy. That is all the question relates to, and it excludes other causes which might prevent the contemplated employee from accepting employment and prevent the making of a contract.

SIR CHARLES FITZPATRICK: It would not, I suppose, be assumed that if a foreigner—without mentioning any particular nationality—were prohibited from entering the country, such foreigner could be employed by an inhabitant of the United States in connection with this industry?

SENATOR ROOT: Well, there is another question which is not here.

SIR CHARLES FITZPATRICK: Is it not impliedly here? He would not be an inhabitant of the United States?

SENATOR ROOT: No; but it would not be his non-inhabitancy of the United States, which is all that this question involves, that would prevent his being taken in. It would be the existence of a law that excluded that particular class of aliens.

SIR CHARLES FITZPATRICK: It would be by reason of some personal disqualification?

SENATOR ROOT: Yes, of a law prohibiting criminals to be brought in. I should not say that you are called upon, in passing upon this question, which specifies the right of the employer and the criterion of inhabitancy, to pass upon the question whether they would be entitled to take habitual criminals in, or people who are of immoral character, or people who are diseased, or people specially excluded for any particular cause. The range of the questions is too vast to regard them as being included within this question, which simply points to inhabitancy as affecting the right of the employer.

THE PRESIDENT: You consider the question as if it were put in these terms: Is non-inhabitancy a reason for preventing the United States from employing certain persons in their crews on fishing-vessels?

SENATOR ROOT: Yes, from employing such persons.

THE PRESIDENT: Is non-inhabitancy a reason for preventing them?

SENATOR ROOT: Yes.

THE PRESIDENT: But the question is not framed in that way. It is framed in a more objective way:—

“Have the inhabitants of the United States, . . . . a right to employ as members of the fishing crews of their vessels persons not inhabitants?”

We are asked whether the United States are entitled to employ these persons, and we are not asked whether the United States are prevented, by reason of non-inhabitancy, from employing certain



categories of persons. It may be that the question has this meaning, but it seems not to be clearly expressed.

SENATOR ROOT: That may be. Perhaps after ascertaining what doubts arise upon the form of the question in any case, a question might be usefully reframed for the purpose of meeting the doubts. But I do not see how it is possible for you to decide upon anything but the effect of the habitancy or non-inhabitancy upon the right of the employer, for that is all there is in the question, and, as to the incidental effect of the legislation, I do not see how it is possible for you to limit that by going on and deciding a lot of other possible questions, rather than by a safeguarding phrase in your Award showing that you do not decide them.

1341 SIR CHARLES FITZPATRICK: But this question calls for "yes" or "no" for an answer. If we say "yes," what is the result?

SENATOR ROOT: Of course, it will be competent for you to say that you do not pass upon any question relating to the right of any non-inhabitant to accept employment.

SIR CHARLES FITZPATRICK: That means that our answer "yes" is not sufficient, but that it must be qualified.

JUDGE GRAY: It must be qualified in view of the fact that counsel for Great Britain in this case distinctly raised that question, and we cannot avoid qualifying it in order to make it effective if the answer should be one way.

SENATOR ROOT: If the answer should be "no," then, of course, that excludes the United States from the employment of non-inhabitants, and these statutes are of no consequence at all.

THE PRESIDENT: But the difficulty arises if the answer should be "yes."

DR. DRAGO: I understood Senator Turner to say that in such a case we would make the reservation that nothing had been decided about this; but he did not know whether other Counsel for the United States should take the same view.

THE PRESIDENT: Mr. Root says the same thing now.

SENATOR ROOT: Yes, my intention was to repeat the suggestion of Senator Turner.

SIR CHARLES FITZPATRICK: Yes, but that would not meet the difficulty. If it is necessary to make a reservation, is it not because there is something more involved in the question than appears on the surface of it?

SENATOR ROOT: I should not say so, your Honour. I should say that it is necessary because counsel for Great Britain have insisted that there is something more in it, and it is reasonable to guard against people making your Award the basis of dispute and controversy by inferring that you meant to do something more, and did it.

THE PRESIDENT: Perhaps it is convenient to adjourn now and continue at 2 o'clock. The Court adjourns until 2 o'clock.

[Thereupon, at 12 o'clock, the Tribunal took a recess until 2 o'clock p. m.]

AFTERNOON SESSION, FRIDAY, AUGUST 12, 1910, 2 P. M.

THE PRESIDENT: Will you kindly continue, Mr. Senator Root?

SENATOR ROOT: As to Question 6:—

“Have the inhabitants of the United States the liberty under the said Article or otherwise to take fish in the bays, harbors, and creeks on that part of the southern coast of Newfoundland which extends from Cape Ray to Rameau Islands, or on the western and northern coasts of Newfoundland from Cape Ray to Quirpon Islands, or on the Magdalen Islands?”

I wish merely to point out the historical origin of the use of the word “coasts” in the treaty of 1783 to describe the fishing right granted by that treaty to inhabitants of the United States.

As I have suggested in the argument upon another question, the preliminary articles of peace agreed upon by the British and American negotiators in 1782 were made subject to and not to take effect until the conclusion of the treaty of peace between Great Britain and France, the ally of the United States in the then existing war; the definitive treaties of peace between Great Britain and the United States and between Great Britain and France were parts in effect of the same transaction, the treaty between Great Britain and the United States being limited according to the recital of its preamble to the conclusion of the French treaty.

I have already pointed out that both the treaty of the 3rd September, 1783, with the United States, and the treaty of the same day and forming part of the same general settlement between Great Britain and France, treated of the fishery rights upon this same coast:

and the treaty dealing with those rights granted to Americans, 1342 naturally employed the same words, the same forms of expression, which were found in the pre-existing treaty between Great Britain and France granting the same rights upon the same coast, and said the inhabitants of the United States should have liberty to take fish on the coast of Newfoundland, as that pre-existing treaty said the subjects of the French King should have the liberty to take fish on the coast of Newfoundland, and the words, the form of expression, must be deemed to have the same meaning in the grant of that right on that coast to the two different Powers who were concerned in that transaction.

While Mr. Turner was making his argument, the Court called for or expressed a wish to have the proceedings of the Halifax Commis-



sion, and Mr. Turner said that he would procure them for the Court, and I now have the honour to hand them up. Both sides, of course, are in possession of them. In doing so I beg to call the attention of the Tribunal to the second map which is enclosed in this volume of proceedings. That is the same map which is referred to in the copy of the proceedings of the Halifax Commission, or that part of the copy of the proceedings of the Halifax Commission printed in the American Counter-Case Appendix, at p. 547. In the next to the last paragraph on that page occurs this statement:—

“A reference to the accompanying map will show that the coast, the entire freedom for which for fishing purposes has thus been acquired,” &c., &c.

The map which is now before the President, in that volume which I have handed up, is a copy of the map here referred to. I ask the Tribunal to observe that in that map, which is the British map used in the Halifax proceeding, there is a legend which states that part of the coast coloured red is the part not within the limits of the grant of 1818, but carried by the new grant of 1871, while the part coloured blue is the part within the limits of the treaty of 1818, and to observe that the blue line which marks the limits of 1818 takes in all the bays and harbours, showing that at that time Great Britain quite well understood that all the bays and harbours that were included within that blue line were within the grant of 1818.

We have a provision in the New York code of procedure, a code prepared by Mr. David Dudley Field, the same gentleman whose international code the Tribunal is familiar with, to the effect that—

THE PRESIDENT: May I interrupt you a moment, Mr. Senator Root: Of course this map, as being in the British Blue Book, is familiar to the British counsel?

THE ATTORNEY-GENERAL: I cannot say that we are familiar with the whole of the proceedings in the Halifax Commission. I was just consulting my friend Sir Robert Finlay about it. It comes upon us as somewhat of a surprise, but I do not want to interrupt my learned friend Senator Root. We will look at this map, and we will see whether we have any observations to make upon it. I am sure each side only desires to act fairly by the other, and if any observations occur to us, I am sure Senator Root would not mind our sending a memorandum—

SENATOR ROOT: I certainly should.

THE ATTORNEY-GENERAL: You say you would mind?

SENATOR ROOT: Yes; certainly. I think any observations to be made must be made now.

THE ATTORNEY-GENERAL: Then I am sure I must object to the evidence. How can I make observations now, in the middle of a speech?

**SENATOR ROOT:** I do not think my learned friend will insist upon his objection, in view of the fact that this is the very volume from which Mr. Ewart read.

**THE ATTORNEY-GENERAL:** Certainly I have no objection whatever to the admission of any evidence which has been already put before the Tribunal, and which both sides have had an opportunity of considering. Of course, my friend Mr. Root is putting in various documents which we have not had an opportunity of considering. Some of these documents I can deal with in a few minutes at the end of his speech, in accordance with the understanding that when any new points are raised in the last speech there shall be permission to the other party to deal with them. But a matter of this kind, which involves the examination of the maps and of a very lengthy record, is not a matter with which I can deal immediately upon the termination of Mr. Root's speech. We have not seen it, and I do not even know to what he is referring.

1343     Of course the final speech is intended to be a speech dealing finally with the evidence before the Tribunal, and is not intended to be a speech in which new evidence may be put in. There are many passages of different documents of a bulky character which have been put in evidence. That does not mean that the whole document is treated as being part of the evidence. I have no objection to anything being done which may facilitate the Case for the United States on the point, but one must have the means of dealing with them one's self in some fair and rational way.

**SENATOR ROOT:** Of course there is not the slightest objection to the Attorney-General calling attention to any matter which he thinks worthy of attention in regard to this book which I have handed to the Tribunal. I am merely calling attention to the very book, portions of which were printed in the American Counter-Case, and from which the British counsel have read. Surely I am entitled, when this book has been produced here, and the attention of the Tribunal called to certain features of the proceedings, to call the attention of the Tribunal to other features of the same proceedings in the same book.

**THE ATTORNEY-GENERAL:** By all means, provided of course that the passages to which my learned friend refers are passages which he proposes to put in as evidence, and which, therefore, are material, but I must have the opportunity of considering them.

**SENATOR ROOT:** I am not putting in any new evidence whatever. The map was distinctly referred to in the Counter-Case Appendix of the United States, and this map was referred to in the Counter-Case of the United States at p. 101:—

“A reference to the accompanying map will show that the coast, the entire freedom of which for fishing purposes has thus been acquired by the United States,” &c.



THE ATTORNEY-GENERAL: That does not put in the map. It refers to the map, but the map has not been one of the documents put in.

It is unnecessary to trouble over a matter which may turn out to be quite unimportant. I have not seen the map, and it may be that there is nothing at all to which I object in it. I do not anticipate that there will be. I am only suggesting that if it should turn out, upon a careful examination, that there is any observation which might properly be made about this map, I should be at liberty to make it, to send it afterwards to Mr. Root and let him see what is said about it, and then forward it with his own observations to the Tribunal. I thought that was a simple way of dealing with it. I dare say there will be no observations to make at all.

SENATOR ROOT: It is too simple. There must be an end some time to argument. Any observation that the learned counsel sees fit to make regarding this map, which has been the subject of repeated reference, which was referred to in our Counter-Case, and referred to in our Counter-Case Appendix, and which is in a volume from which both parties have printed, and which was in the volume that British counsel a month ago used in his argument to the Tribunal—any observation the learned counsel chooses to make regarding that, before the conclusion of this oral argument, of course is entirely beyond objection. But there must be an end some time to the argument of this case. Personally I am about to leave the city, when the argument of the case is completed, and the other American counsel are in the same situation. We can not remain here for the purpose of receiving and examining, and perhaps answering briefs or further printed arguments put in after the conclusion of the oral argument. I think in that respect we must stand upon the treaty, which is that Cases shall be exchanged within a fixed time, and that Counter-Cases shall be exchanged within a fixed time, that printed Arguments shall be exchanged within a fixed time, and shall be delivered to the Tribunal within a fixed time, and that then there shall be oral Argument, the oral Argument to end the proceedings so far as the presentation of the Case is concerned.

I have made no objection, and shall make no objection, in view of the fact that my Argument is the concluding one, to any observation or correction on the part of the Attorney-General of my manifold shortcomings and inaccuracies. But I think that the proceedings should close with the oral argument to-day, and that we should not be subject to remain here for a further course of proceeding after the conclusion of it.

THE ATTORNEY-GENERAL: I can assure my learned friend that I am not suggesting that we should remain here. That is the very last alternative that I desire to submit to the Tribunal. I understood my

friend was putting in all the proceedings. If he is simply putting in this map I dare say we may look at the map and find there 1344 is nothing objectionable in it, and I shall be very glad to admit it; but if he is putting in the whole volume of proceedings it is rather a different matter.

SENATOR ROOT: I am putting in nothing. I am responding to a promise made by Mr. Turner in response to a question and the expression of a wish by the Tribunal to have the proceedings of the Halifax Commission, which had been the subject of repeated reference and the basis of extensive argument. The Court asked if it could have access to that proceeding, and Mr. Turner said he would get it for the Court, and I am handing it to them.

THE ATTORNEY-GENERAL: If it is the desire of the Court, of course, that it should see the volume, then I make no objection. But my learned friend has put in several pieces of fresh evidence, and, really, that is a procedure which is covered by the statement he has just made. He says the treaty stipulates that the evidence should be delivered within a certain time, and then it shall be met by a Counter-Case and by other evidence, and that the parties are concluded when that is done, and that they are not able to put in further evidence. I was only objecting to having a great mass of evidence put before the Tribunal at the very last moment, when it is impossible for anyone to deal with it effectively; but as far as the map itself is concerned, if I may see a copy of it, then those who instruct me and advise me will be able to judge whether there is any objection to it, or any observation to make upon it, and I may deal with it at once. At present I have not even seen a copy. I do not know what is being referred to.

THE PRESIDENT: The Court will consider the point. Perhaps Mr. Root will continue his speech, and we will consider this point at the end of it.

THE ATTORNEY-GENERAL: In the meantime we might see the map.

SENATOR ROOT: There have been a number of papers produced in response to expressions from the Tribunal, and there have been some expressions regarding papers which have not been produced. I have understood that that was all in accordance with article 68 of the General Hague Convention:—

“The Tribunal is free to take into consideration new papers or documents to which its attention may be drawn by the agents or counsel of the parties.

“In this case, the Tribunal has the right to require the production of these papers or documents, but is obliged to make them known to the opposite party.”

I was about to say that we have, in Mr. Field's Code of Procedure, in the State of New York, a provision that a plaintiff or com-



plainant who conceives that the answer of the defendant is frivolous may move to strike out the answer; and if it is stricken out, the result is that he is entitled to take his judgment *pro confesso*. I remember many years ago a motion being made of that character before a very experienced judge, and counsel making the motion began to argue upon the frivolousness of the answer. The judge stopped him and said: "If this requires argument, the answer is not frivolous, and your motion is denied." With that view I shall say nothing more whatever about Question 6.

As to Question 7:

"Are the inhabitants of the United States whose vessels resort to the treaty coasts for the purpose of exercising the liberties referred to in Article I of the treaty of 1818 entitled to have for those vessels, when duly authorized by the United States in that behalf, the commercial privileges on the treaty coasts accorded by agreement or otherwise to United States trading vessels generally?"

I quite agree with an observation made the other day from the bench that these questions are all questions of both parties. Both parties have united in framing them, and presenting them to the Court, and both parties are responsible for them. Nevertheless, when a difference arises as to the construction in two ways of a question, it may be of some advantage to the Tribunal, in endeavouring to put itself in the attitude of the parties who framed the question at the time when they framed it, to know what the origin of the question was, from what element of controversy the question came. For that purpose, as an aid to the construction of the question by the Tribunal, I advert to the fact that this question, like Question 6, had its origin in Newfoundland. It was a Newfoundland question, not a United States question, or a British question. The United States

was not particularly concerned about it. We find on p. 1014 1345 of the United States Appendix a letter from Governor MacGregor to Lord Elgin of the 14th September, 1907, and the paragraph of that letter numbered 2 touches this subject. Said Governor MacGregor:—

"It may be presumed that neither His Majesty's Government nor that of the United States would desire to withhold any part of the case from consideration, a complete and full representation of which is clearly necessary and desirable in order to arrive at finality, and to save future misunderstanding. Your Lordship is, for example, aware that my Prime Minister has consistently disputed the right of American fishermen to fish or trade in the bays, harbours, and creeks of the West Coast, a point of great importance on which special stress is laid in the letter copy of which is enclosed."

On the preceding page, p. 1013 of the same Appendix, is a telegram from Governor MacGregor to Lord Elgin, in the third paragraph of which he said:—

"My Ministers, however, still desire to aid His Majesty's Government as far as possible consistently with their duty to this Colony, and the preservation of its rights; they will therefore grant permission to the fishermen of the Treaty Coast to sell to Americans during the coming season on the receipt of an assurance from His Majesty's Government that the terms of reference to the Hague Tribunal shall include the question of the right of American vessels to fish or trade in any of the bays, harbours, or creeks of that portion of Newfoundland Coast between Cape Ray and Quirpon Islands, together with all other questions that may be raised under the Treaty."

And on p. 1014 again, we find the telegram from Lord Elgin to Governor MacGregor, dated the 2nd September, 1907, saying:—

"Your telegram, 1st September. It will be necessary to refer to United States Government the question of the terms of arbitration; but provided that your Government now accept proposed *modus vivendi*, His Majesty's Government would favourably consider the reference to arbitration of question of bays."

And from that grew these two questions, Question 6 and Question 7: The question of the right to fish and the question of the right to trade. Of course the question being framed, it becomes our question and Great Britain's question. It was rather a surprise to us, because the diplomatic correspondence between the two countries, the United States and Great Britain, indicated an entire agreement upon this trading matter.

The American Secretary of State, in his letter to the British Minister at Washintgon, on the 19th October, 1905, which appears in the American Appendix at p. 966, had referred to certain despatches which had been received from masters of American vessels in Newfoundland waters, in these words:—

"These despatches agree in the statement that vessels of American registry are forbidden to fish on the Treaty Coast. One captain says that he was informed that he could not fish by the Inspector of the Revenue Protection Service of Newfoundland, and several of them that they had been ordered not to take herring by the Collector of Customs at Bonne Bay, Newfoundland.

"It would seem that the Newfoundland officials are making a distinction between two classes of American vessels. We have vessels which are registered, and vessels which are licensed to fish and not registered. The licence carries a narrow and restricted authority; the registry carries the broadest and most unrestricted authority. The vessel with a licence can fish, but cannot trade; the registered vessels can lawfully both fish and trade. The distinction between the two classes in the action of the Newfoundland authorities would seem to have been implied in the despatch from Senator Lodge which I quoted in my letter of the 12th, and the imputation of the prohibition of the Minister of Marine and Fisheries may perhaps have come from the port officers, in conversation with the masters of American vessels, giving him as their authority for their prohibitions."



And the same letter further said—

“far the greater part of the fleet now in northern waters consists of registered vessels. The prohibition against fishing under an American register substantially bars the fleet from fishing.”

To those representations the reply was received from the British Ambassador, which appears in the American Counter-Case Appendix, at p. 633, saying:—

“His excellency”——

The Governor of Newfoundland,

“telegraphs that no Newfoundland officer is preventing American vessels from fishing on the treaty coast, and that no distinction is being drawn between registered vessels and licensed vessels.

And Sir Edward Grey, treating of the same subject, said in a memorandum, a rather formal and maturely prepared memorandum, transmitted by him on the 2nd February, 1906, to the American Ambassador at London, some things about this treatment of American registered vessels, that is, American vessels which are authorized by their own Government both to trade and fish. The letter of Sir Edward Grey enclosing the memorandum is at p. 971 of the American Appendix. The memorandum is found beginning on p. 972, and on p. 974 of the memorandum occurs this statement, in the last paragraph on that page:—

“It is admitted that the majority of the American vessels lately engaged in the fishery on the western coast of the colony were registered vessels, as opposed to licensed fishing-vessels, and as such were at liberty both to trade and to fish.”

And at p. 976, the same memorandum says, in the next to the last paragraph on that page:—

“The distinction between United States registration and the possession of a United States fishing licence is, however, of some importance, inasmuch as a vessel which, so far as the United States Government are concerned, is at liberty both to trade and to fish naturally calls for a greater measure of supervision by the Colonial Government than a vessel fitted out only for fishing and debarred by the United States Government from trading; and information has been furnished to His Majesty's Government by the Colonial Government which shows that the proceedings of American fishing-vessels in Newfoundland waters have in the past been of such a character as to make it impossible from the point of view of the protection of the Colonial revenue, to exempt such vessels from the supervision authorized by the Colonial Customs Law.”

That was the occasion of no controversy whatever between the Government of the United States and that of Great Britain. The question of supervision is certainly one about which there could be no controversy. If an American vessel seeks to trade with Newfoundland, whether she is a fishing-vessel or not, she must be sub-

jected to the kind of supervision which is appropriate to a trading-vessel. What my learned friend said about hovering is covered by that perfectly. A vessel going to the coast to trade cannot hover. If she is going to trade, she must clear from her home port for a specified port. Every one of these registered vessels has to do that. She must clear for a specified port, she must not deviate from her voyage, she must go to that port, and go directly to the port. She cannot stop, she cannot hover, she must go to the port and she must make entry, and she must subject herself to those regulations and provisions of law which are appropriate to the supervision of trading-vessels. The real question is whether when the vessel has discharged its function as a trading-vessel, and is completely through, it can then abandon its trading function and take a cargo for the return voyage by catching fish.

That is what the practical question comes down to. There is no question about the mingling of the two at the same time. And I repeat that it was a matter of considerable surprise that Great Britain should have wished to include this question in the list that was submitted to the Tribunal. It is explained by these letters and telegrams passing between the Government of Newfoundland and the Government of Great Britain, to which I have now referred, but which, at the time, we did not know of.

JUDGE GRAY: It does not give the trading-vessel, does it, Mr. Root, the right to buy bait if there is a statute forbidding the sale of bait to any foreign vessels, registered or fishing?

SENATOR ROOT: Certainly not. No such question is raised here. I wish again to put in a guard against waiving or giving up any possible consequences of your agreeing with the British theory of our rights, as a result of your decision on Question 1. It is possible, if you go with the British view under Question 1 and say that our exercise of the right is a matter so common with the exercise of the right of the Newfoundlanders that we must be subject to the same right of restriction and modification that they are subject to, you must also say that we must have, as we insist, all the privileges and opportunities that are connoted by the obligation.

SIR CHARLES FITZPATRICK: That does not arise here.

SENATOR ROOT: I wish always, in what I say about the effect of this question to file a caveat against being understood as saying or implying that that may not be a consequence of your Award under Question 1. But this question does not in any degree whatever touch the question whether Newfoundland can be compelled to trade with us, or whether Newfoundland is not perfectly at liberty to prohibit the export of any particular article or prohibit the sale of any particular article. It merely goes to the question as to whether a vessel of the United States which is authorised to trade is, by



1347 virtue of that fact, excluded from the fishing privileges, or whether a vessel which is there to fish is thereby excluded from the trading privileges, whatever they are, that have been accorded to trading-vessels generally. What the extent of the trading may be is not involved at all, and it raises no question whatever as to what the provisions against trade, the provisions against the export of anything, or against the dealing in anything, or trading in anything, of the Newfoundland Government may be, or what the effect of them may be. Nor, may I say here, is it really a question of the purchase of bait. The real question of the purchase of bait, the great, the substantial one, arises when American vessels bound for the banks wish to buy bait in Newfoundland for the purpose of taking it down to the banks and using it there. The Tribunal will perceive that those vessels are not exercising the treaty right at all. They do not come under this question. This question is not framed to cover them in any way whatever. Perhaps if the United States had been exercised about this, and had been getting up questions, if the origin had come from us, we would have been concerned about that, which is really a very serious question—that is the question as to whether we can get bait for use on the banks. But this question does not touch it. The question is limited strictly to the vessels that go there for the purpose of exercising the liberty under Article 1 of the treaty:—

“Are the inhabitants of the United States whose vessels resort to the treaty coasts for the purpose of exercising the liberties referred to in Article One of the Treaty of 1818 entitled to have for those vessels . . . the commercial privileges,” &c.

That does not touch at all that great bait procurement question in which we are so vitally interested.

JUDGE GRAY: The question would have been, of course, easy to answer if it had been:—

“Are the inhabitants of the United States resorting to these coasts for the purpose of exercising their treaty rights as fishing vessels disentitled thereby to exercise the privileges generally accorded to trading vessels if they are properly registered?”

But this is put the other way.

SENATOR ROOT: I know; but if you answer that they are not entitled, you say that they are disentitled; you must; that is, that must be the effect of your answer, because the postulate of the question is that commercial privileges are accorded to the United States trading-vessels generally. The Tribunal, of course, is not at liberty to say they are not; and the question is entirely irrespective of what they are. The question also assumes that the United States has authorised or may authorise particular vessels to exercise the privileges of trading-vessels; that is to say, that the United States makes particular

vessels of its own its trading-vessels. The question is: Is a vessel which, for convenience, we may as well call what it is—a registered vessel—going to the treaty coast purposing to exercise the treaty right, belonging to the general class to which by the postulate of the question trading privileges are accorded, entitled when it gets there to those trading privileges? If not, it must be because there is something in the treaty which excludes it from those privileges. If not, it must be because there is something in the treaty which authorised the Government of Newfoundland to discriminate against that vessel. If there is anything in the treaty which justifies the discrimination against that vessel, which justifies taking it out of its class and excluding it from the privileges of its class, why then, the Tribunal will have to say that such a vessel is not entitled. If there is nothing in the treaty which justifies making a discrimination against that vessel, making it an exception to the class to which it belongs, to which has been accorded or may hereafter be accorded trading privileges, the Tribunal will, I submit, have to say that the vessel is entitled. The true answer, I submit, is that the treaty neither entitles nor disentitles an American trading-vessel to use the privileges accorded to its class. The treaty does not affect the subject at all. My learned friends say these privileges may be withdrawn. Of course they may be withdrawn; but the postulate of the question is their existence, and their existence is protected by far wider interests than the particular question Sir Robert Bond was so much interested in: the trade between two great nations, affecting many, many millions of people, the relations of kindly feeling, the enormous benefits received by both nations from their intercourse in commerce—those are the considerations which preserve the trading privileges accorded by each nation to the vessels of the other, and we are not concerned about there being a cessation of commercial intercourse between the United States and Great Britain. The only thing we are concerned with here is whether there is anything in this treaty which entitles the Government of Newfoundland to say: “These particular vessels, belonging to the class to which has been accorded trading privileges, certified by their government as belonging to that class, are to be discriminated against and excepted from the class.”

THE PRESIDENT: What is the basis, Mr. Senator Root, on which we have to decide this Question 7? Where have we to take our answer to Question 7?

SENATOR ROOT: I think the basis is the consideration of the terms of the treaty.

THE PRESIDENT: The consideration of the terms of the treaty?

SENATOR ROOT: As to whether there is anything in the terms of the treaty which affects or changes any commercial privileges accorded to the class of trading-vessels.



DR. DRAGO: The commercial privileges are not given in virtue of the treaty?

SENATOR ROOT: Not at all. They are entirely outside of the treaty. The question is whether there is anything in the treaty that takes them away.

THE PRESIDENT: But the question is not put in that way, as was mentioned by Mr. Justice Gray. The question is put in the affirmative form, and not in the negative form.

SENATOR ROOT: I do not think it matters much, Mr. President, whether it is put in the affirmative or the negative. Your answer has to be affirmative or negative.

SIR CHARLES FITZPATRICK: That is the difficulty.

SENATOR ROOT: You say they are entitled, or they are not entitled. Your answer relates to the treaty. They are entitled, if at all, not by virtue of the treaty but by virtue of these privileges having been accorded to the class which is the postulate. Of course, they had those unless there is something in the treaty to lead you to answer this question in the negative. You cannot find a negative to this question unless you find the ground for it in the treaty. This is the position.

SIR CHARLES FITZPATRICK: What would be the effect, now, if this question were put in the way you suggested at the beginning, so as to cover the case of a trading-vessel going direct from an American port to a Newfoundland port, discharging her cargo and then proceeding to fish? I think there is only one answer possible to it. Any inhabitant of the United States may fish from a trading-vessel under those circumstances; he may fish from a raft or from a balloon, or any other means of conveyance he may have. But let us look at the question. If that question is answered in the affirmative, what would be the result? The result would be that this Tribunal would declare that the inhabitants of the United States whose vessels resort to the treaty coast for the purpose of exercising the liberties referred to in article 1 of the treaty of 1818 are entitled to have for those vessels when duly authorised by the United States in that behalf, the commercial privileges on the treaty coasts accorded by agreement or otherwise to United States trading-vessels generally. That would be the result. In my opinion that would mean that a fishing-vessel, licensed to fish, could go up there and exercise her fishing right, and then, if authorized by the United States, would be entitled to supplement her action as a fishing-vessel and become a trading-vessel; and in the interval, of course, the Hovering Acts and all these other Acts would not apply to her, so long as she remained a fishing-vessel. Putting the case the other way about, instead of sending your trading-vessels direct to Newfoundland and then afterwards having them act as fishing-vessels, this question here, in my judgment, as I see it

now, presupposes the action of the fishing-vessel coming up to Newfoundland and then afterwards being converted into a trading-vessel.

SENATOR ROOT: Of course, trading privileges are subject to the regulations appropriate to secure the proper conduct and the proper exercise of the trading privilege. There can be no claim of a right to trade on the part of a vessel which does not conform to those regulations; and the regulation against hovering, the regulation which requires a trading-vessel to come directly into the port in which  
1349 it is to trade would apply equally to any vessel that seeks the privilege of trading which has also purposed to fish, as to any vessel which has not. It is perfectly within the competency of Newfoundland to say to any vessel which has not come direct from port to port that it cannot trade. The moment the vessel applies for the trading privilege, it subjects itself to all the limitations upon that privilege; and it must not have disqualified itself by any conduct which is in contravention of those regulations.

This concludes the Argument which I had in mind to make, and I beg to express, on behalf of the counsel and the agent of the United States, their very high appreciation of the attentiveness and consideration and courtesy with which we have been received and heard by the Tribunal.

1350 **REPLY BY THE RIGHT HONOURABLE SIR WILLIAM SNOWDON ROBSON, ATTORNEY-GENERAL OF ENGLAND.**

SIR WILLIAM ROBSON: Mr. President, I do not propose to avail myself of such width of indulgence as Mr. Root has indicated may possibly be within my right. I am certainly not going to attempt to correct what I conceive to be in particular cases inaccuracies on the part of Mr. Root. I think I have no right to do anything of the kind. The only right I shall ask, and Mr. Root indicates he would willingly see it granted, is to deal with two or three pieces of fresh evidence which have been laid before the Tribunal by Mr. Root. I think I can do it in a few minutes, and I think I shall not trouble you with more than one reference to the Appendix.

The first point to which I think attention may properly be drawn was the assertion by Mr. Root that certain cases which had been cited, one by my learned friend Mr. Ewart and one by myself, on Question 1, with regard to the meaning attributed by an American Judge to the words "in common," have been overruled.

It may be remembered that my learned friend Mr. Ewart cited a case of the United States *v.* The Alaska Packers Association.<sup>a</sup> I cited a case referring to a vessel named the "James G. Swan."<sup>b</sup> Both of these cases deal with the construction of treaties made

<sup>a</sup> 79 Fed. Rep., p. 152.

<sup>b</sup> 50 Fed. Rep., p. 108.



between the United States and various Indian tribes. I referred to a judgment dealing with the words in the treaty then under consideration, which are very like the words in the treaty of 1818—in fact, almost identical. The Judge there stated that the words “in common” must be construed to mean on “terms of equality.” I need not go into the point, because it is in the recollection of the Tribunal.

Now, Mr. Senator Root said those two cases had been overruled, and for that purpose he cited the case in 1904 of *United States v. Winans*.<sup>a</sup> He did not read the whole of the judgment or show how the cases cited by my learned friend Mr. Ewart and myself had been overruled, as he alleged.

The Supreme Court, or the Court of Appeal, which then had before it the consideration of the case of *United States v. Winans*, of course was not dealing with any appeal from the other two cases, and it could only have overruled them by indicating its dissent from the judgments there given.

Now, I venture to say my learned friend Mr. Root is mistaken in supposing that those two cases were overruled. The case of the *United States v. Winans* was dealt with, and the other two cases were discussed. It was stated that the learned Judge had improperly applied the principle laid down in the “James G. Swan” case to the case of *Winans*, and his judgment in the case of *Winans* was overruled, was reversed, but the Court did not say that the principle on which the “James G. Swan” case was decided was a wrong principle. The Court only said that it was in that particular case wrongly applied. There was therefore no overruling of the case of the “James G. Swan,” and it will appear in the report which the learned Senator put in that the United States counsel himself carefully distinguished the case of the “James G. Swan” from that which was then under consideration. That is all I need say about that case. It is in the hands of the Tribunal. I am quite ready to go through the facts in each of the cases in order to make good what I have said, but all the documents are before the Tribunal, and I deal with them in the same general way in which Mr. Root has himself dealt with them.

Then there was another case as to which I think I should say something.

The United States have produced a copy of a written judgment from the archives of a Newfoundland Court in the year 1820, a decision by the then Chief Justice of Newfoundland.<sup>b</sup> It is a little embarrassing or puzzling to find out what he was Chief Justice of at that date. I have no doubt there was a Chief Justice of New-

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<sup>a</sup> 73 Fed. Rep., p. 72; 198 U. S. Rep., p. 371.

<sup>b</sup> See Appendix, *infra*.

foundland, but I have always understood that it was common ground for both parties, that Newfoundland was practically an unsettled territory. However, there appears to have been a Chief Justice, and I have no doubt he gave the decision which has been cited. According to that decision, he held that the Crown had no power to make proclamations in Newfoundland—I need not read the judgment—that the Crown had no power to legislate by proclamation in Newfoundland, and he therefore treated as invalid certain of the proclamations which we have included in our schedule of regulations which we said had been made by the authorities of Newfoundland, and indicated that the fishery was then a regulated fishery.

Well, it would not very materially affect my argument on Question 1, even if that decision were accurate, because after all the  
1351 parliamentary legislation which existed, is quite sufficient to make good my point, but I can scarcely allow this decision to pass without some observation.

It is not reported in any authorised law report. The Chief Justice of Newfoundland in the year 1820 is, I think, scarcely a very competent authority to be accepted in the year 1910, or indeed in any other year, upon the constitutional prerogatives of the British Crown. And I would just say this about his decision: He said he relied upon the case of *Campbell v. Hall*,<sup>a</sup> the decision of a very great Judge, to justify his opinion as to the powers of the British Crown. It is sufficient to refer to that case to show how completely mistaken the Chief Justice of Newfoundland was in the decision that he gave. The case of *Campbell v. Hall* is one of course very familiar indeed to English lawyers, especially to those who are concerned with constitutional prerogatives. That case is also before the Tribunal, and I need not refer to it in detail. There were two acts or orders of the Crown to be considered. One of them imposed a duty of 4½ per cent. on certain commodities. Another granted a constitution to the colony. It so happened that by some inadvertence or mistake the order granting the constitution was published and made effective first. The order imposing the duty was published after the granting of the constitution. It was held in that case that the order imposing the duty was invalid, because the Crown, having granted the constitution, could not derogate from that grant by seeking subsequently to impose a duty, but it was also treated as perfectly well-known law that, if the order in council imposing the duty had been published first, before the grant of the constitution, it would have been a perfectly valid order. It therefore does not negative, on the contrary it affirms the power of the Crown to legislate for colonies having no self-governing constitution.

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<sup>a</sup> Cowper's Rep., p. 204.



That was the case of *Campbell v. Hall*, and when one comes to think about it, it must be so. Why, the Chief Justice of Newfoundland was not sitting there under any Act of the Imperial Parliament. He could only have been appointed by the Royal prerogative, the very prerogative which he was assuming to limit and abolish, so far as that particular case was concerned. Until a constitution is granted, the Royal prerogative is the only means by which such places can be governed; and in the case of Newfoundland there was not any constitution until 1834. The question might arise as to whether Newfoundland ought to be classed as a settled or as a ceded colony. We have all had before us the treaty of 1713, by which France ceded the island of Newfoundland to Great Britain, and the law with regard to ceded colonies is perfectly clear, viz., that the King's prerogative is absolute. It was more qualified with regard to settled colonies. There the settler carried with him the common law of England. Of course he could not carry with him the constitution of England, so the King used to grant charters framed according to the stage of development of the particular colony. All charters were granted under the Royal prerogative, and not under any Act of Parliament. We have had instances of it in the grant of charters and constitutions during the last few years in South Africa. Nobody has ever doubted the sufficiency of the Royal prerogative for all such legislative acts, but according to the decision of the Newfoundland Judge they would all be invalid.

I will say nothing about the point concerning which we had a slight discussion a few moments ago as to whether or not this map and the volume of proceedings ought to be admitted. I withdraw any objection which I made with regard to that evidence. My learned friend Mr. Root is at liberty to put it forward, and the Tribunal may take it and read it. I am quite prepared to trust the Tribunal. I would not like it said I had objected to the admission of any document whatever. So the Tribunal need not trouble itself to consider that point.

But there is one piece of evidence of real importance—not only of real importance, but of very high value—which has been put in by my learned friend Mr. Root to which I desire to draw attention. Though it will be short, I hope it will be of service. He read, I think yesterday, a passage which had not been previously read from the American State Papers, vol. iv, p. 337. It related to the negotiations immediately preceding the treaty of 1818, and was therefore of exceptional pertinence and importance. He was laying down the proposition that Great Britain had not only never claimed the "bays" which were in question, but that she had refused to admit that they were properly comprised within the territorial jurisdiction of a State. I am not going to comment upon that. That is part of

the general argument. I only say it is a really astonishing proposition when one thinks of all the documents which preceded this date. That was Mr. Root's proposition. He said Great Britain actually refused to have these bays treated as territorial.

1352 I need not remind the Tribunal of the importance of this question of territoriality. If the bays were claimed and treated as being within the territory of Great Britain by the Powers concerned either before or after the treaty of 1818, then Question 5 is practically decided in our favour, because Great Britain would then be as completely master of those bays, as any man is master of his own property, and no alien could fish there without her permission. They would therefore be included, without controversy, among the "bays . . . of His Majesty's Dominions" on or within which the United States renounced the privilege of fishing.

Now, this was a passage which related to belligerency. It was this:—

"In all cases where one of the high contracting parties shall be at war, the armed vessels belonging to such party shall not station themselves, nor rove or hover, nor stop, search, or disturb the vessels of the other party, or the unarmed vessels of other nations, within the chambers formed by head-lands,"

That is one classification of waters. That phrase corresponds really to the phrase "King's chambers." It includes much more than "bays." It includes every bay, and much more than a "bay." Now comes the next prohibited area proposed:—

"or within five marine miles from the shore belonging to the other party, or from a right line from one headland to another."

Now, we are dealing there with two areas of water, only two. In the first it is proposed that each party should treat as being within the jurisdiction of the other not only all the "bays" in the other's country, but more than the bays, viz., all the waters that are comprised in chambers formed by headlands, and also all the waters within 5 marine miles from the shore belonging to the other party, or from a right line drawn in front of every coastal curvature from one headland to another. Now, what does that mean? If that had been accepted and embodied in the treaty it would have amounted to this: A straight line would have been drawn wherever you have water between headlands, but that would not have provided for the unindented or uncurved shore; and, therefore, the framers of this article go on to provide for the unindented shore, and they say we will give you, or each gives to the other, 5 marine miles from the unindented shore.

Now, imagine the first line drawn closing all the headlands. Then you are to have a line of 5 miles outside of that line, because the 5-



mile line is to be drawn from the unindented shore, and from a line from one headland to another. So that when you come to draw your 5-mile line you draw it all round the coast, 5 miles from the shore, where the shore is straight, and 5 miles from the line between headlands where the shore is curved. So that here is a proposal—and I cannot sufficiently express my obligation to the learned Senator for drawing attention to it—here is a proposal by the Americans at the very time we are making this treaty, in the very same projet, in which we have this fishery article, and according to that proposal every chamber formed by headlands in either country is treated as being within the exclusive jurisdiction of that country; and as the coast does not consist entirely of such chambers, but as part of it is open, they go on to say, not only shall you have these chambers, but you shall have 5 miles on the seaward side of them as well as 5 miles from the coast where it is not curved.

Now, that is parallel in principle to the fishery article. This parallel between the two articles—one relating to belligerency, and the other relating to fishing—is one on which I desire to lay stress.

In the fishery article we have the renunciation. The United States renounce any liberty claimed by the inhabitants to dry or cure fish—now mark, “within 3 miles of any of the coasts, and within 3 miles of any of the bays,” so that there they do exactly in the fishery article what is done in the belligerency article, though the provision is limited to bays only, and does not extend to all coastal curvatures. They enclose all the bays within an imaginary line, all of them, and then when they have done that the United States say to Great Britain, “Now that belongs to you, that is in your jurisdiction, and we are going to keep yet further away; we are going to keep ourselves 3 miles beyond that line.” They thus do in the fishery article that which they themselves proposed in the belligerency article. They lock up all the bays, and then give Great Britain a maritime jurisdiction beyond them. That is the way in which the words “maritime jurisdiction” are used in the preceding negotiations. “Maritime jurisdiction” is not used really with reference to the “bays” at all. The “bays” are treated as territorial. They are treated as being sea water located within the body of a country; and though that expression may occasionally be used in a general  
1353 sense so as to comprise bays, it does not seem to be applied to them specifically. They use the expression “maritime jurisdiction” in relation to the coastal belt whether, as in the passage quoted by Mr. Root, 5 miles from the open shore and 5 miles from a line drawn between headlands enclosing chambers, or, as in the fishery article, 3 miles from the open shore and 3 miles from the mouths of bays. That is why I desire to draw attention in this

connection, and I think it is very important in this connection, to the letter with which Mr. Root dealt from Lords Holland and Auckland.

Now let me look at that letter with reference to this article—on p. 61, British Case Appendix.

The second paragraph is the one Mr. Root read:—

“The distance of a cannon-shot from the shore is, as far as we have been able to ascertain, the general limit of maritime jurisdiction, and that distance is for the sake of convenience practically construed into 3 miles or a league. All independent nations possess such jurisdiction,”

and particular circumstances justify an extension.

It is worth while just to compare the two paragraphs, and compare them with this new piece of evidence.

Mr. Root read that, and he took the words “maritime jurisdiction” as being comprehensive. He said “maritime jurisdiction” means 3 miles, nothing else. It means 3 miles from the shore, and therefore he inferred it meant 3 miles from the shore on a sinuosity line going into the bays, and he founded on that the argument that bays were not to be treated as a whole; that the maritime jurisdiction of 3 miles from the shore meant you could go into the bays, and as long as you kept 3 miles away from the shore of a bay you were outside of the maritime jurisdiction. Now, that clearly was not the intention, as appears not only from the new evidence produced by Mr. Root, but from this very letter; because lower down comes this important paragraph:—

“*The space between headlands* is more generally laid down, and admitted by Grotius himself, as subject to the exclusive jurisdiction of the power to whom the land belongs. But neither in theory nor in practice do we find the distance between the headlands to which such a rule must exclusively apply accurately defined. James 1st by his royal proclamation dated 1st of March 1604, prohibiting hostilities between belligerent nations within his jurisdiction, stated headlands more than 90 miles distant one from another as forming bays necessarily dependent on and belonging to the adjoining territory—but it is remarkable that the Spaniards who were one of the objects of this prohibition, considered the order as a relaxation not as an extension of his lawful jurisdiction over the seas.”

Now here in this letter, and in the belligerency proposal, what do we find? The words “maritime jurisdiction” are used in reference to this 3-mile or 5-mile or 10-mile or 14-mile belt of water, what I may call the coastal belt, but the bays, which might be far wider than that distance, which Lords Holland and Auckland say might be 90 miles between headlands—bays were all included in the territory before you came to deal with the coastal belt at all. When Lords Holland and Auckland speak of maritime jurisdiction they mean sim-



ply the coastal belt. They do not mean that you are to be at liberty to enter bays. Now this new evidence produced by the United States puts that beyond a doubt, because here we have them making a proposal with regard to belligerents, and they say, first, let each nation take all the chambers between headlands, and then when it has got all the chambers between headlands, let it in addition to that take a maritime jurisdiction of 5 miles outside these chambers, just as in the fishery article Great Britain was to have its bays and a maritime jurisdiction of 3 miles from their entrance.

Now, Mr. Root went on to say we refused this belligerency proposal, and he said we had refused, therefore, to treat bays as territorial. Well, it is not strictly accurate to say that we refused it. All that can be said is that the proposition did not appear in our counter-projet, and why not? The reason is obvious. This proposal gave far more than bays to each country, far more. It gave far too much. Take, for instance, a line drawn from headland to headland along the coast. Why, you could enclose the whole coast of the United States within three or four of such lines. It really meant that not merely every bay, but every curvature of the coast was to be treated as territorial; every curvature, every place that no map and no geography would dream of calling a bay, was, according to this proposal, to be put in the same category as bays. Now, Great Britain could not accept this proposal, and did not repeat it in her counter-projet. What she had been saying at this time, in letter after letter, was "You shall not enter our bays;" but she had never gone so far as to say, "We are going to acknowledge it as an international or quasi-international right, that not only bays but every kind of curvature or indentation in a coast shall be treated as territorial;" that undoubtedly would have limited very severely indeed the operation of the British fleet. The is why we did not accept it, but to suggest that we did not accept it because we would not admit bays to be territorial is a suggestion for which there is no kind of foundation at all—none.

Now, I think one may see clearly how the words "maritime jurisdiction" were being used, and what was in the minds of the writers of these letters. They all said, "We mean to have our bays, we will not let you into them, but when you go beyond bays, and you seek a tremendous extension of this kind, and ask our acceptance of a proposal of this kind, we will not do that. Take one line, for instance, from the south Cape of Florida to the Mississippi—what an immense area of coast you would lock up there."

Just one further observation, still on the same piece of evidence. It is a very remarkable proposition that Mr. Root put forward in connection with this evidence. He said "We were wanting to terri-

torialise bays in 1818, and Great Britain would not do it." Well, what about the argument upon which the United States have been relying, that we had come to a definite agreement in 1806 with regard both to the maritime zone and to bays. Apparently that was the argument on which Mr. Warren founded himself. Mr. Root now seems not only to abandon that, but to treat it as inconsistent with the true state of the facts. I venture to say that Mr. Root has made clear, if any further clarity were required—he has made clear what was in the minds of all those who read these letters and made this treaty. Wherever they talked of the maritime jurisdiction they were talking of the coastal belt to be drawn round a coast. They considered that all bays were within the jurisdiction of the country in which they were situated, and that, being within the jurisdiction, they were subject to full control over fishing rights, and that the bays in question in this case were granted by the treaty of 1783, and renounced by the treaty of 1818.

THE PRESIDENT then spoke as follows:—

Gentlemen:

There is a noble custom prevailing among the members of the Bar in Anglo-Saxon countries, to address one another as "friends," even if they represent the adverse parties of a litigation. So counsel on one side and on the other have done in this international proceeding.

So much the more it may be my privilege, in the name of the Tribunal, to address counsel on both sides as our friends, and to thank you for all the friendly assistance you have lent us during these weeks and months. You have led us through the maze of a hundred years of diplomatic correspondence, through the jungle of entangled statutes, through the dark forest of almost metaphysical problems, in which it was sometimes difficult to see our path, up to the summit of the mountain, where we hope we may see the problem we have to deal with in the light of truth and of justice.

I thank you all for the most valuable assistance we have had from your speeches, for the courtesy you have shown us, and especially for the courtesy you have shown to one another. I am sure that the chivalrous spirit in which you have treated the grave controversies existing between your countries will facilitate us to come to a just and happy solution of them.

It is with regret that we take leave of you, who have been our friends and our guides in this long and sometimes laborious journey.

I beg the agents of both parties, as well as the Secretary-General and his colleagues, to accept the preliminary expression of our thanks,



I say preliminary, as we shall apply to their assistance still for some time in our future work.

I also consider it my duty, before leaving, to thank the gentlemen who have their places immediately before me, and I desire to have their names on the record, Mr. Nelson R. Butcher, Mr. F. R. Hanna, Mr. Geo. Simpson, Mr. G. van Casteel, and Mr. John W. Hulse, and their assistants, for the accuracy, intelligence and punctuality with which they have reported the case.

The day of the next meeting for publication of the Award will be communicated to the agents and counsel of the parties at least four days in advance.

I declare the discussion closed. The Tribunal adjourns *sine die*.















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